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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-673

In the Matter of

A Motion to Compel Arbitration

between

INTEROCEAN SHIPPING COMPANY,

Respondent,

—and—

NATIONAL SHIPPING AND TRADING CORPORATION and HELLENIC INTERNATIONAL SHIPPING, S.A.,

Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners National Shipping & Trading Corporation and Hellenic International Shipping, S.A. respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on June 24, 1975.

Opinions Below

The opinion of the Court of Appeals is not yet reported officially, but may be found in the appendix and, unofficially,

at 1975 A.M.C. 1283. That Court's prior opinion is reported at 462 F.2d 673 (2d Cir. 1972) and is also set out in full in the appendix. The opinion of the District Court has not yet been reported, but is set out in full in the appendix.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on June 24, 1975. A timely petition for rehearing was denied on August 8, 1975, and this petition for certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. May a federal court, ruling on a motion to compel arbitration under § 4 of the Federal Arbitration Act, after finding that no agreement to arbitrate had been made by a party, make any further finding as to that party?

2. May a Court of Appeals disregard state substantive law as to the standard of proof required by the Statute of Frauds to prove a guarantee in writing?

The first question affects only Petitioner National. The second question affects both Petitioners.

Statutes Involved

United States Code, Title 9:

§ 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination.

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default

in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

July 30, 1947, c. 392, 61 Stat. 671; Sept. 3, 1954, c. 1263, § 19, 68 Stat. 1233.

New York General Obligations Law:

§ 5-701. Agreements required to be in writing

Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking:

• • •

2. Is a special promise to answer for the debt, default or miscarriage of another person;

• • •

Statement of the Case

Interocean Shipping Company (hereinafter "Respondent") petitioned in The United States District Court for the Southern District of New York to compel Petitioners to arbitrate pursuant to the Federal Arbitration Act, 9 U.S.C. § 4.

Respondent alleged that a charter party between Respondent, as owner of the vessel "Oswego Reliance," and Petitioner, National Shipping and Trading Corporation (hereinafter "National") and Petitioner Hellenic International Shipping S.A. (hereinafter "Hellenic"), as charterers

of the said vessel, was entered into on March 17, 1971, that the alleged charter party contained an arbitration clause and that Petitioners had failed and refused to proceed to arbitration.

Petitioners answered denying that a charter party had been entered into and, thus, the making of an agreement to arbitrate.

The District Court, without conducting a trial, found that the making of the arbitration agreement was not in issue and, on December 30, 1971, granted the petition.

On appeal, the United States Court of Appeals for the Second Circuit reversed the finding of the District Court and held that the making of the arbitration agreement was, indeed, in issue and remanded the matter for a summary trial on that issue.

On remand, the District Court granted the petition as to both Petitioners finding, *inter alia,* that National had agreed to guarantee Hellenic's performance of the charter party and, thus, was a party to the charter party itself and its arbitration agreement.

Petitioners again appealed to the Court of Appeals, which modified the Order of the District Court by eliminating the direction that National proceed to arbitration and affirmed the Order of the District Court, as so modified. In its opinion, the Court of Appeals discussed with approval and adopted the District Court's finding that National was a guarantor of Hellenic's performance of the charter party and let that finding stand even though it had held in National's favor on the only issue properly before it, whether an agreement to arbitrate had been made by National. Petitioners' petition for rehearing was denied by the Court of Appeals.

Thus, as matters stand, National has been held to be a guarantor of performance under the charter party found

by the District Court to exist between Hellenic and Respondent, even though the question whether it was a guarantor was not raised in the original petition to compel arbitration nor was it properly before any court at any time, except as it may have been used as evidence in deciding the question whether National had made an agreement to arbitrate.

The facts relevant here are as follows:

Discussions between Harry Theodoracopulos, Vice President of National, and Francis DeSalvo, an officer of the chartering brokerage firm of Poten & Partners, Inc., respecting the "OSWEGO RELIANCE" commenced at lunch on March 17, 1971. It was contemplated that, provided terms acceptable to both parties could be arranged, the vessel would be chartered by Respondent to Hellenic. It was understood that National was acting as Hellenic's agent. DeSalvo communicated with one Anthony Germano, an officer of an affiliate of Respondent, and, during the afternoon, passed several messages between Germano and Theodoracopulos respecting the vessel and the terms the two parties wanted included in any charter party that might be arranged. DeSalvo testified that he was acting as broker for both parties, which is not uncustomary in the ship chartering business.

There was a dispute with respect to the guarantee that Hellenic is alleged to have promised to obtain. It is undisputed that DeSalvo informed Theodoracopulos that Respondent desired to have a guarantee owing to its unfamiliarity with the proposed charterer, Hellenic. It is also undisputed that Theodoracopulos told DeSalvo that such a guarantee "could" be obtained.*

* The District Court, however, found that Theodoracopulos had said a guarantee "would" be given (16-17a) and the Court of Appeals minimized this discrepancy in its opinion (footnote 10, 55a).

At approximately 5:30 P.M. on March 17th, DeSalvo sent telexes, each containing the same text, to Respondent and to Hellenic, the latter through National, commencing:

> CONFIRM HAVING FIXED FOR YOUR ACCOUNT TODAY AS FOLLOWS:
>
> OWNER: INTEROCEAN SHIPPING COMPANY
>
> CHARTERER: HELLENIC INTERNATIONAL SHIPPING S.A. OF PANAMA SUBSIDIARY OF NATIONAL SHIPPING AND TRADING WITH APPROPRIATE LETTER OF GUARANTEE.
>
> * * *

The telex went on to list certain terms the alleged charter was to include. (The full text of the telex is set out in the appendix at 17-18a.) Some time after the telex was sent, DeSalvo prepared a form of guarantee* and submitted it to Respondent, on whose behalf Germano approved it. However, the form of guarantee prepared by DeSalvo shows Harry Theodoracopulos, personally, as guarantor and not National. At no time was a personal guarantee of Theodoracopulos discussed, nor was the form prepared by DeSalvo and approved by Germano ever sent to National or to Theodoracopulos because, according to DeSalvo, "we never got to that point." (Trial Transcript, p. 123.)

---

* DRAFT
of

Date_____

GUARANTY OF HARRY THEODORACOPULOS

Reference charter party dated March 17th, 1971, between HELLENIC INTERNATIONAL SHIPPING, S.A. OF PANAMA, and INTEROCEAN SHIPPING COMPANY, Owners of the "OSWEGO RELIANCE" subject to terms and conditions of above mentioned charter party, I hereby guaranty the performance of HELLENIC INTERNATIONAL SHIPPING S.A.

_____

Harry Theodoracopulos
National Shipping & Trading Corp.

Notwithstanding DeSalvo's telex of March 17th, allegedly confirming a "fixture," negotiations between the parties as to outstanding items actually continued until the morning of March 24th, when they were terminated by Petitioners owing to "the absence of meeting of the minds of the parties regarding all details necessary to a completed charter agreement * * *." (44a)

On the first appeal the Court of Appeals stated:

> The essential question on this appeal is whether, within the meaning of the Federal Arbitration Act, "the making of the arbitration agreement" was in issue, thus requiring a trial of this question before directing appellants to proceed with the arbitration of a maritime dispute. [footnote omitted] (2a)

As to National, the issue, as stated by the Court of Appeals was "whether National is a party to the charter agreement and hence to the arbitration agreement contained therein." (8a) The Court went on to explain:

> This question is placed in issue by the fact that National is not accorded the same status in either Interocean's petition, the "Mobiltime" form charter or the fixture note. The petition merely states that Hellenic is a subsidiary of National, which fact would not in itself be sufficient to make National liable for breach of agreement to charter. Moreover, the "Mobiltime" form sent to Hellenic refers to National as the charterer's agent. Since Hellenic was a disclosed principal, National's acting as agent would not make it a party to the charter agreement. Restatement (Second) of Agency §320 (1958). Furthermore, the fixture note, after referring to Hellenic, adds "subsidiary of National Shipping & Trading with appropriate letter of guarantee". Interocean now points to the fixture note as showing that National was the guarantor under the charter. *If in fact National were a surety, however, it still*

> *could not be held accountable for Hellenic's breach of the charter agreement. Merely agreeing to act as surety for a charter party is not a maritime contract. Pacific Surety Co.* v. *Leatham & Smith Towing & Wrecking Co.*, 151 F. 440, 443-44 (7 Cir. 1907). See also *Kossick* v. *United Fruit Co.*, 365 U.S. 731, 735 (1961). *This suretyship therefore would be subject to the New York statute of frauds. Since National's alleged guarantee was not in writing, it would not be enforceable.* N.Y. General Obligations Law §5-701 (2) (McKinney 1964).
>
> Thus, while it is impossible to determine National's status on the basis of this confused record, there was sufficient uncertainty to entitle National to a trial on this issue. [Emphasis supplied.] (8-9a)

At the trial in the District Court it was settled, in colloquy among counsel and the Court that the issues were (1) whether "there ever came into existence that meeting of the minds on all of the essential terms of the contract so as to result in an enforceable contract," and (2) if so, whether National was bound by that contract (see colloquy from trial transcript reproduced at 10-11a).

The District Court granted Respondent's petition to compel arbitration and filed an opinion, which began:

> A formal trial of this non-jury proceeding to enforce arbitration was held by me following remand from the Second Circuit Court of Appeals to determine whether a binding contract had been entered into by the parties which, by its terms, requires them to arbitrate the question of whether there was a breach of the charter-party in suit by the defendants. (12a)

The District Court described its understanding of its mandate from the Court of Appeals as follows:

> The Court of Appeals pointed out that a trial should determine whether in all the conversations between the parties there was a meeting of the minds

> which thereafter memorialized in a fixture letter or memorandum by which NATIONAL was bound.
>
> Specifically, with respect to the question whether there was a meeting of the minds, the Court of Appeals held that this trial should determine whether the parties had agreed on drydocking, insurance and delivery range, and if they had not, whether these were such material items as to frustrate the existence of a contract; with respect to whether NATIONAL was bound, that this trial should determine whether the broker had authority to bind NATIONAL. NATIONAL was acting as agent for a disclosed principal—the charterer, HELLENIC —*or was a guarantor of performance by Hellenic, the charter party, and, if a guarantor, whether the fixture letter was sufficient to satisfy the Statute of Frauds of New York as to such guarantee* (N.Y. General Obligations Law, Section 5-701 (2), McKinney's 1964). [Emphasis supplied.] (12-13a)

It appears that the District Court considered the resolution of the question whether National was a guarantor collaterally necessary to any holding that National was a party to the charter party and the arbitration agreement and not a separate issue. For instance, the Court stated:

> I also find that it was the understanding of the parties, through DeSalvo and [Theodoracopulos] that National would give a guarantee on behalf of HELLENIC *and so bind itself to the charterparty.* [Emphasis supplied.] (27a)

In a footnote to that statement, the Court explained:

> The guarantee was not recited in the charterparty because it was no part of it; the guarantee of performance was really a separate agreement. Discussion on this point is limited to whether National should be a party to this suit *as surety of the charterparty* made by HELLENIC, one of the issues raised

by the Court of Appeals. But see *Dover SS Co.* v. *Summit Industrial Corp.*, 148 F.Supp. 206, holding this to be a question for the arbitrator.* [Emphasis supplied.] (27a)

The Court also stated:

> I find that National was to be the surety for the performance of HELLENIC *and thus liable as a respondent* for the non-performance of HELLENIC; this, irrespective of the role it may have played as agent for HELLENIC in negotiating the charterparty. It was in the business of negotiating for its subsidiaries. [Emphasis supplied.] (29a)

The Court dismissed Petitioner's argument that there existed no guarantee of National enforceable under the New York Statute of Frauds, held by the Court of Appeals to be controlling, by declaring that:

> [T]he telex which contained the clause requiring the guarantee *was the contract between the parties*; I find that DeSalvo had authority to act for both; and, since DeSalvo signed the telex, I conclude that the guarantee was in writing signed by the agent of the party to be charged, National. [Emphasis supplied.] (30a)

Petitioners once more appealed to the Court of Appeals. The Court of Appeals agreed with all that the District Court had held, except for its holding that National was a party to the charterparty and, thus, obligated to proceed to arbitration. It stated:

> While the court properly ordered Hellenic to arbitrate since Hellenic was a party to the charter agree-

* It should be noted that the *Dover* case does not remotely involve suretyship or the guarantee of performance of a charter party by a third person.

ment, we hold that it erred in ordering National to arbitrate since National was only a guarantor and not a party to the agreement. (55-6a)

The Court of Appeals explained that:

> Whether a guarantor can be compelled to arbitrate on the basis of an arbitration clause in the main contract must be considered separately from the question of a party's obligation to arbitrate.
>
> The only indication that the district court considered this question is its statement:
>
> > "I . . . find that it was the understanding of the parties, through DeSalvo and H.T., that NATIONAL would give the guarantee on behalf of HELLENIC and so bind itself to the charter party. . . ." (footnote omitted).
>
> If this was meant to be a finding of fact that National had bound itself to the charter party by its acts, we find no support for it in the record. The fixture telex stated:
>
> > "CHARTERER: HELLENIC INTERNATIONAL SHIPPING S.A. OF PANAMA SUBSIDIARY OF NATIONAL SHIPPING AND TRADING WITH APPROPRIATE LETTER OF GUARANTEE."
>
> DeSalvo's notes indicated only that Hellenic was a subsidiary of National. The Mobiltime form which National refused to execute refers to National only as the charterer's agent. *There is no evidence that National acted in any capacity except as a disclosed agent for Hellenic. As we held on the prior appeal, this is not enough to bind it to the arbitration clause in the charter agreement.* 462 F.2d at 678.
>
> If the language of the district court quoted above was meant to be a statement of law that National, by agreeing to act as a guarantor, bound itself to

> the arbitration clause in the main agreement, we hold it to be error. A mere guarantor of a charter party generally cannot be compelled to arbitrate on the basis of an arbitration clause in the main agreement since it is not a party to that contract. *Taiwan Navigation Co.* v. *Seven Seas Merchants Corp.*, 172 F.Supp. 721 (S.D.N.Y. 1959); see *Import Export Steel Corp.* v. *Mississippi Valley Barge Line Co.*, 351 F.2d 503, 506 (2 Cir. 1965); *Instituto Cubano De Estabilizacion Del Azucar* v. *T/V Golden West*, 246 F.2d 802 (2 Cir.), *cert. denied*, 355 U.S. 884 (1957); *Cia. Naviera Somelga, S.A.* v. *M. Golodetz & Co.*, 189 F.Supp. 90, 96 (D. Md. 1960). [Emphasis supplied.] (56-7a)

Having found that National was not a party to the charter, the Court of Appeals modified the District Court's order insofar as it directed National to proceed to arbitration, but did not dismiss the proceeding as to National, as was required by § 4 of the Federal Arbitration Act.

Reasons For Granting the Writ

The Court of Appeals below has 1) decided an important state question in a way in conflict with applicable state law, 2) has decided an important question of federal law which has not been, but should be, directly settled by this Court and 3) has decided a federal question in a way in conflict with applicable decisions of this Court.

If the question of the existence of a guarantee was not necessary (or only ancillary in an evidential sense) to a finding that a charter and hence an arbitration agreement had been made, then at least as to National the question of a guarantee was never properly before the Courts below and

the petition to compel arbitration as to National should have been dismissed. The mandate of the Courts below under § 4 of the Federal Arbitration Act was solely to decide whether there was an agreement to arbitrate.

If, however, the Courts below considered the existence of a guarantee to be a *sine qua non* of the charter, including an agreement to arbitrate, then the petition to compel arbitration should have been dismissed as to both petitioners for the proof that a guarantee existed was insufficient as a matter of controlling New York substantive law, which required "clear and unequivocal" evidence "to be gathered from the writing itself" that National intended to be so bound. The Court of Appeals, in reviewing the District Court's findings as to a guarantee, applied the wrong test. The proper test was not whether such findings were supported by "substantial evidence" (48a), but rather the much more stringent substantive rule required by the New York courts. In so doing, it allowed to stand the District Court finding of a guarantee which was based in major measure on parole evidence extrinsic to the "writing" said to evidence the guarantee.

1. The Decision Below Conflicts With the Federal Arbitration Act, 9 U.S.C. § 4, In That the Court of Appeals Sanctioned the District Court's Holding On a Matter Not Properly Within the Scope of Inquiry Under the Act.

If the decision of the Court below is allowed to stand it will affect not only National but also the judicial implementation and application of the Federal Arbitration Act itself. It appears to be the first instance in which a holding concerning a substantive right of a party has survived a decision that such party had not made an arbitration agree-

ment. Thus, this Petition seeks review of a novel and important question arising in connection with the Act. The Act requires that "If the jury [the Court in this admiralty case] find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, *the proceeding shall be dismissed.*" [Emphasis supplied.]

It has been properly held "that a federal court, in a suit asking it to compel arbitration, should * * * deal with no issues except (1) the making of an agreement to arbitrate, and (2) the failure, neglect or refusal of the other party to perform that agreement." *Reconstruction Finance Corp.* v. *Harrisons & Crosfield, Limited,* 204 F.2d 366, 368 (2d Cir. 1953) *cert. den.,* 346 U.S. 854 (1953). See also *Prima Paint* v. *Flood & Conklin Mfg. Co.,* 388 U.S. 395 (1967); *Steelworkers* v. *American Mfg. Co.,* 363 U.S. 564 (1960); *National R.R. Passenger Corp.* v. *Missouri Pacific R.R. Co.,* 501 F.2d 423 (8th Cir., 1974); *Warren Brothers Company* v. *Cardi Corporation* 471 F.2d 1304 (1st Cir. 1973); *Hamilton Life Ins. Co. of N.Y.* v. *Republic National Life Ins. Co.,* 408 F.2d 606 (2nd Cir. 1969); *Galt* v. *Libbey-Owens-Ford Glass Company,* 376 F.2d 711 (7th Cir. 1967) 397 F.2d 439, cert. den., 393 U.S. 925 (1968); *World Brilliance Corp.* v. *Bethlehem Steel Co.,* 342 F.2d 362 (2nd Cir. 1965); *Aberthaw Construction Co.* v. *Centre County Hospital,* 366 F. Supp. 513 (M. D. Pa. 1973) aff'd without opinion, 503 F.2d 1398 (3rd Cir. 1974); *International U. of E., R. & M. W.* v. *Westinghouse Elec. Corp.,* 48 F.R.D. 298 (S.D.N.Y. 1969); *Swift Industries, Inc.* v. *Botany Industries, Inc.,* 297 F. Supp. 1056 (W. D. Pa. 1969).

Issues not bearing directly on the "making" of an agreement to arbitrate may not properly come before a federal court on a motion to compel arbitration under § 4 of the

Federal Arbitration Act. To allow the Court's holding on the guarantee to stand, a matter not within the purview of the statute, would inevitably expand the jurisdiction and scope originally intended for the federal court system under the Act by the addition of a host of collateral matters, issues and even parties.

As to the effect on National, the decision of the Court below creates an intolerable situation. If National were to allow the decision below to go unchallenged, and an arbitration proceeding were held between Respondent and Hellenic in which Hellenic were held liable in damages, National would undoubtedly be called upon, in the event of Hellenic's failure to respond in damages, to respond itself even though it seems clear that the District Court had no jurisdiction to decide that National was a guarantor. National might find itself precluded by a claim of *res adjudicata* from obtaining its day in court for an ordinary and full trial of that issue.

The conflict between the decision of the court below and the plain meaning of the Federal Arbitration Act justifies the grant of Certiorari to review the judgment below.

2. The Decision Below Is In Direct Conflict With Applicable New York Substantive Law Relating To Guarantees.

The court below held in its first opinion that New York law was controlling on the question of whether the "fixture" telex was sufficient to bind petitioner as a guarantor. §5-701, of the New York General Obligations Law.*

* "Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking; . . .

2. Is a special promise to answer for the debt, default or miscarriage of another person;"

Here, the question is whether the "fixture" telex (1) was such a writing and (2) whether it was subscribed by petitioner's "lawful agent." The substantive New York law on the point, as stated in *Savoy Record Co.* v. *Cardinal Export Corp.*, 15 N.Y.2d 1, 6-7; 203 N.E. 2d 206; 254 N.Y.S. 2d 521, 525-6 (1964) is:

> The obligation of a guarantor, is admittedly, a heavy one and the courts should refrain from foisting such an obligation upon a party, be he individual or corporation, who simply signs as agent, absent the requisite clear and unequivocal evidence, *to be gathered from the writing itself*, that he intended to assume such a liability. [Emphasis supplied].

It is apparent from the "writing itself," the only source from which the intent of the parties is to be divined, that no such writing was either made or subscribed. The "fixture" telex begins, "CONFIRM HAVING FIXED FOR YOUR ACCOUNT TODAY • • •." [Emphasis Supplied] As National has been specifically held not to be a party to that "fixture," the language "FOR YOUR ACCOUNT" can only refer to Hellenic. The only reference in the "fixture" telex to the guarantee is in connection with the identification of the charterer, Hellenic.

> CHARTERER: HELLENIC INTERNATIONAL SHIPPING S.A. OF PANAMA SUBSIDIARY OF NATIONAL SHIPPING AND TRADING WITH APPROPRIATE LETTER OF GUARANTEE. (17a)

Further, the only reasonable interpretation of the words "WITH APPROPRIATE GUARANTEE" is that Hellenic would undertake to procure a guarantee and the subsequent preparation by the broker of a form of guarantee (not that of National but of Harry Theodoracopulos personally) was

not, as the District Court found, merely to memoralize something which had already been agreed to, but shows that the parties intended that the guarantee would not come into being until the identity of the guarantor and the terms had been agreed to and it was subscribed so as to be enforceable under the Statute of Frauds. *Schenck* v. *Francis*, 26 N.Y.2d 466, 311 N.Y.S.2d 841 (1970).

The District Court's opinion is not inconsistent with such interpretation for that Court stated "The *commitment to supply the guarantee* was but one of the details of the fixture, not unusual in the shipping business. DeSalvo had actual as well as apparent authority *to bind the charterer* to it." [Emphasis supplied.] (27a). But Hellenic, not National, was the alleged "charterer." DeSalvo, therefore, can only reasonably be found to have signed the "fixture" telex on behalf of Hellenic. No "writing" that would have bound National as guarantor was ever subscribed by anyone.

Moreover, the alleged "fixture" telex itself is silent as to the terms of the guarantee, incorporates no other document by reference and does not specifically state that the guarantee would be that of National. Most importantly the words "WITH APPROPRIATE GUARANTEE" in the telex do not themselves constitute a guarantee.

Thus, even on the facts as found by the District Court and approved by the Court below, the holding that the "fixture" telex passes the stringent test required by the New York Statute of Frauds must fall because it conflicts with New York's expressed statutory and judicial policy regarding what constitutes a writing sufficient to support a guarantee.

In New York, the Legislature has distinguished between a writing necessary to support a guarantee and one suffi-

cient to indicate an agreement for the sale of goods or securities. The degree of formality required by the Statute of Frauds for a guarantee (§5-701(2) of the General Obligations Law) is very much greater. *Weiss* v. *Wolin*, 303 N.Y.S.2d 940 (Sup. Ct. Special Term 1969).

> In recodifying the statute of frauds the legislature on the recommendations of the Law Revision Commission and the Commission on Uniform State Laws respectively, treated portions differently. Thus, agreements not to be performed within one year, guarantees, etc., and conveyances and contracts concerning real property, etc., are found in the General Obligations Law (§§ 5-701, 5-703). These statutes provide that any such agreement is void unless it or some note or memorandum thereof is in writing, subscribed by the party to be charged therewith.
>
> On the other hand, agreements for the sale of goods or for the sale of securities were placed in § 2-201 and § 8-319 of the Uniform Commercial Code. These sections declare that such agreements are not enforceable unless there is some writing sufficient to indicate that the agreement had been made, signed by the party against whom enforcement is sought. The choice of language in each instance must be regarded as significant * * *. It is not straining to assume that the distinction was made between void contracts in the one case and "unenforceable" contracts in the other because the first dealt with contracts which should be prepared with greater formality while the latter treated of agreements made daily in the market place. *Weiss* v. *Wolin*, *supra*, at 942-3.

Thus, the proper standard to be applied to the findings of the District Court in regard to the existence of a guarantee was whether there was clear and unequivocal evidence to

be gathered from the writing itself of an intention by National to assume such liability. *Savoy, supra,* and *Salzman Sign Co.* v. *Beck,* 10 N.Y.2d 63, 217 N.Y.S.2d 55 (1961).

Moreover, under controlling New York substantive law the requirement of "clear and unequivocal evidence" cannot be supplied by parole evidence extrinsic to the writing as was done below. Such evidence must have existed within the four corners of the "fixture" telex itself.

Such interpretation is confirmed by the testimony of DeSalvo that the guarantee "was an item which would have to be agreed upon after he [DeSalvo] had passed some form of guarantee to [Theodoracopulos] to study," and that the draft guarantee was never sent to either National or Theodoracopulos because "we never got to that point" (Trial transcript, p. 123).

The District Court, counsel and DeSalvo all concurred during the course of the trial that he was not the agent of either party and that his agency was definitely not in issue in the case (Trial transcript, pp. 151-5). After the trial, however, in order to find that a guarantee by National came into existence, the District Court held that DeSalvo was National's agent for purposes of subscribing a writing. The finding that a charter broker, despite his wholehearted disclaimer of any such authority, is "an agent" empowered to execute a guarantee on behalf of one of the parties in charter negotiations without express written authority to do so, if allowed to stand, would introduce into New York charter negotiations the precise risks the New York Legislature and Court of Appeals have sought to preclude.

Conclusion

For all of the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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(462 F.2d 673)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 749—September Term, 1971.

(Argued May 23, 1972 Decided June 23, 1972.)

Docket No. 72-1150

INTEROCEAN SHIPPING COMPANY,

Petitioner-Appellee.

v.

NATIONAL SHIPPING AND TRADING CORPORATION and HELLENIC INTERNATIONAL SHIPPING, S.A.,

Respondents-Appellants.

Before:

FRIENDLY, *Chief Judge,* and
FEINBERG and TIMBERS, *Circuit Judges.*

Appeal from an order of the District Court for the Southern District of New York, Dudley B. Bonsal, *District Judge,* directing appellants to arbitrate petitioner's claim for breach of a charter party, pursuant to §4 of the Federal Arbitration Act, 9 U.S.C. §4 (1970).

Reversed and remanded.

DAVID I. GILCHRIST, New York, N.Y. (Eli Ellis, Mark M. Jaffe and Hill, Betts & Nash, New York, N.Y., on the brief), *for respondents-appellants.*

Opinion of Court of Appeals Decided June 23, 1972
(462 F.2d 673)

JAMES M. ESTABROOK, New York, N.Y. (Joseph R. Kelley, Jr., Lennard K. Rambusch and Haight, Gardner, Poor & Havens, New York, N.Y., on the brief), *for petitioner-appellee.*

TIMBERS, *Circuit Judge:*

The essential question on this appeal is whether, within the meaning of the Federal Arbitration Act, "the making of the arbitration agreement" [1] was in issue, thus requiring a trial of this question before directing appellants to proceed with the arbitration of a maritime dispute.

In July of 1971 Interocean Shipping Company, acting pursuant to the Federal Arbitration Act,[2] filed a petition in the district court to compel arbitration of a dispute arising under a charter party allegedly entered into by Interocean and appellants National Shipping and Trading Corporation and Hellenic International Shipping, S.A. The petition alleged that on March 17, 1971, National and Hellenic agreed to charter Interocean's vessel, the Oswego Reliance, for a period of approximately one year pursuant to the terms of the "Mobiltime" form charter, which included a clause providing for arbitration of "any dispute arising under [the] charter . . ." Interocean further alleged that National and Hellenic repudiated this agreement on March 24, 1971. Appellants' answer denied the material allegations of the petition and demanded a trial. National's president, in an affidavit attached to the answer, stated that there had never been a meeting of the minds as to all the essential elements of a charter party. On December 30, 1971, without conducting a trial, the district

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1 §4 of the Federal Arbitration Act, 9 U.S.C. §4 (1970).

2 9 U.S.C. §§1-14 (1970).

court concluded that the making of the arbitration agreement was not in issue and granted the petition.[3] For the reasons stated below, we reverse and remand for a trial pursuant to §4 of the Federal Arbitration Act, 9 U.S.C. §4 (1970).

I.

Interocean relied primarily on a fixture note dated March 17, 1971 to show that National and Hellenic had agreed to charter Interocean's vessel. This fixture note was prepared by Poten & Partners, Inc., charter brokers, and was sent to the parties on March 17. It indicated that Hellenic, a subsidiary of National, had agreed to charter the Oswego Reliance for approximately one year in accordance with the terms of a "Mobiltime" form charter, excluding clauses 9, 12(a)(ii), 12(b)(ii) and 12(b)(iii) and subject to a suitable dry-dock clause to be worked out for November dry-docking. The charter was to begin with the delivery of the vessel to Hellenic in the Persian Gulf between March 31 and April 15, 1971.

To substantiate its claim that a charter agreement existed, Interocean also attached to its petition a copy of an unexecuted "Mobiltime" form prepared by the broker on March 17 and sent to the parties. This charter party was intended to reflect the terms of the fixture note allegedly agreed upon by all the parties on March 17. However, while the broker had deleted the clauses referred to in the fixture note, it also had deleted that clause of the "Mobil time" form pertaining to insurance coverage for the vessel. This charter party also set forth a dry-dock clause which

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3 An order compelling arbitration under §4 of the Federal Arbitration Act is a final order and is appealable under 28 U.S.C. §1291 (1970). *Hellenic Lines, Ltd.* v. *Louis Dreyfus Corporation*, 372 F.2d 753, 754 (2 Cir. 1967); *Chatham Shipping Co.* v. *Fertex S.S. Corp.*, 352 F.2d 291, 294 (2 Cir. 1965).

would have required Hellenic to dry-dock the vessel in Spain, Portugal or Japan in November of 1971. Moreover, unlike the fixture note, which, after referring to Hellenic, added "subsidiary of National Shipping & Trading . . .", the charter party which was sent to Hellenic mentioned National as charterer's agent.

Following the receipt of the March 17 fixture note, there ensued a series of communications between Interocean and Hellenic concerning the terms of the charter party which Interocean contends were finalized on March 17. While it is not entirely clear upon which terms these negotiations focused, an examination of the telex messages attached to Interocean's petition reveals that Hellenic did request the inclusion of the Red Sea within the delivery range of the vessel. Hellenic also raised questions regarding Interocean's intention to enter its vessel in the Tanker Owners Voluntary Agreement against Liability for Oil Pollution (Tovalop) and the allocation of the costs of such insurance. Finally, on March 24, 1971, Hellenic broke off negotiations with Interocean, contending that there had never been agreement as to all the essential terms of a charter party.

After National and Hellenic refused to proceed with the arbitration of Interocean's claim for $1.4 million in damages for appellants' breach of the charter party allegedly entered into on March 17, 1971,[4] Interocean filed the instant petition to compel arbitration.

II.

Section 4 of the Federal Arbitration Act provides in relevant part that "[i]f the making of the arbitration

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4 We hold that "the failure, neglect, or refusal to perform" the arbitration agreement is not in issue. 9 U.S.C. §4 (1970). Accordingly, appellants are not entitled to a trial on this issue.

agreement . . . be in issue, the court shall proceed summarily to the trial thereof." [5]

In the instant case, National and Hellenic deny the existence of the charter party which contains the arbitration clause upon which Interocean's petition relies. There can be no doubt that the question of the very existence of the charter party which embodies the arbitration agreement is encompassed within the meaning of "the making of the arbitration agreement." As we said in *In Re Kinoshita & Co.*, 287 F.2d 951, 953 (2 Cir. 1961), "if it was claimed that . . . there had at no time existed as between the parties any contractual relation whatever, . . . a trial of this issue would be required before an order could be issued directing the parties to proceed to arbitration." See also *Kulukundis Shipping Co.* v. *Amtorg Trading Corp.*, 126 F.2d 978, 985-86 (2 Cir. 1942); *Superior Shipping Company* v. *Tacoma Oriental Line, Inc.*, 274 F.Supp. 25, 26 (S.D.N.Y. 1967); *Sinva, Inc.* v. *Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 253 F.Supp. 359, 364-65 (S.D.N.Y. 1966). Accordingly, if the making of the charter party was in issue, within the meaning of § 4 of the Arbitration Act, the district court should have proceeded to trial of this question.

In deciding whether the making of the charter party was in issue, the principles enunciated in *Almacenes Fernandez, S.A.* v. *Golodetz*, 148 F.2d 625 (2 Cir. 1945), are controlling. There, in discussing what a party must show in order to place the making of an arbitration agreement in issue, we said:

> "To make a genuine issue entitling the plaintiff to a trial by jury, an unequivocal denial that the agreement had been made was needed, and some evidence should have been produced to substantiate the denial." 148 F.2d at 628.

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5 9 U.S.C. §4 (1970).

Accord, Ocean Industries, Inc. v. *Soros Associates International, Inc.*, 328 F.Supp. 944, 948 (S.D.N.Y. 1971).

Here we believe that National and Hellenic satisfied the test articulated in *Almacenes Fernandez, S.A.* v. *Golodetz, supra*. Their answer to Interocean's petition categorically denied entering into a charter party with Interocean. Moreover, while appellants might be faulted for not presenting their arguments to the district court in a more coherent fashion, affidavits and exhibits attached to the petition and answer did tend to substantiate appellants' denial of the existence of contractual relations.

In particular, the fixture note, the "Mobiltime" form charter and the telex messages exchanged between Interocean and Hellenic on March 24, 1971 were sufficient to place in issue the question whether there had been a meeting of the minds as to all essential terms of a charter party on March 17. Under the general principles of contract law,[6] there is no contract if the parties fail to agree on all the essential terms or if some of the terms are too indefinite to be enforceable. See *V'Soske* v. *Barwick*, 404 F.2d 495, 500 (2 Cir. 1968), *cert. denied*, 394 U.S. 921 (1969); *Ginsberg Machine Co.* v. *J. & H. Label Processing Corp.*, 341 F.2d 825, 828 (2 Cir. 1965). Here Interocean concedes, as it must in light of the fixture note, that no agreement was reached on a dry-dock clause, but denies that such a clause is an essential term of a charter party. If this were the only issue in the case, we might be inclined to affirm the order of the district court. See Restatement (Second) of Contracts §32(3), Illustration 11 (Tent. Draft No. 1, 1964). However, the telex messages of March 24 tend to show that Interocean and Hellenic

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6 A charter party is merely a contract and hence is subject to all the rules and requirements of contract law. Gilmore and Black, The Law of Admiralty 172 (1957).

had failed to reach agreement on March 17 on several items which might well be integral elements of a charter party. Thus, Interocean's message of March 24 indicates that Hellenic wanted the delivery range of the vessel to include the Red Sea. Furthermore, the fixture note of March 17 indicated that the insurance clause of the "Mobiltime" form would be part of the charter agreement. This clause, however, was deleted from the "Mobiltime" form which the brokers sent to Hellenic. When this deletion is considered in conjunction with Interocean's telex message of March 24 referring to the difficulties in reaching agreement over Interocean's participation in Tovalop, there is enough to place in issue the question of whether the parties agreed upon insurance coverage for the vessel. Whether the parties ever had a meeting of the minds as to the "delivery range" and insurance terms of the charter party and whether these terms, in addition to the drydock clause, can be considered essential terms of a charter party, present issues of fact which can only be determined after a hearing where evidence is received. *Cf. El Hoss Engineer & Transport Co.* v. *American Independent Oil Co.*, 289 F.2d 346, 351 (2 Cir.), *cert. denied*, 368 U.S. 837 (1961); *Hellenic Lines, Ltd.* v. *Louis Dreyfus Corp.*, 249 F.Supp. 526, 527 (S.D.N.Y. 1966), *aff'd*, 372 F.2d 753 (2 Cir. 1967).

We also believe that appellants are entitled to a trial pursuant to §4 of the Arbitration Act on whether Poten & Partners, Inc., the charter brokers, had authority to act for National and Hellenic. Appellants' answer denied the material allegations of paragraph five of the petition, which alleged that appellants had entered into a charter agreement with Interocean on March 17 through Poten & Partners, Inc. This denial is broad enough to encompass the question of Poten's authority to act for National and Hellenic. Moreover, a close examination of the fixture

note lends some support to appellants' denial that Poten was authorized to act for them. This note, which was prepared by Poten and addressed to Interocean, confirmed "having fixed for *your account* today . . ." a charter agreement with Hellenic. (Emphasis added). This quotation indicates that Poten may have been acting solely for Interocean. In any event, appellants presented enough to place in issue the scope of Poten's authority. The resolution of this issue requires a hearing where evidence can be received not only on the relationship between the various parties, but also on the customary practice of the charter brokerage business.

Finally, it is well established that whether a person is a party to the arbitration agreement also is included within the statutory issue of "the making of the arbitration agreement." *Pan American Tankers Corp.* v. *Republic of Vietnam*, 296 F.Supp. 361, 367 (S.D.N.Y. 1969); *Tubos De Acero de Mexico, S.A.* v. *Dynamic Shipping, Inc.*, 249 F.Supp. 583, 587 (S.D.N.Y. 1966); *Instituto Cubano De Estab. Del Azucar* v. *The Theotokos*, 153 F.Supp. 85, 86 (S.D.N.Y. 1957). Here we believe there is enough in the record to place in issue the question of whether National is a party to the charter agreement and hence to the arbitration agreement contained therein.

This question is placed in issue by the fact that National is not accorded the same status in either Interocean's petition, the "Mobiltime" form charter or the fixture note. The petition merely states that Hellenic is a subsidiary of National, which fact would not in itself be sufficient to make National liable for breach of agreement to charter. Moreover, the "Mobiltime" form sent to Hellenic refers to National as the charterer's agent. Since Hellenic was a disclosed principal, National's acting as agent would not make it a party to the charter agreement. Restatement

(Second) of Agency §320 (1958). Furthermore, the fixture note, after referring to Hellenic, adds "subsidiary of National Shipping & Trading with appropriate letter of guarantee." Interocean now points to the fixture note as showing that National was the guarantor under the charter. If in fact National were a surety, however, it still could not be held accountable for Hellenic's breach of the charter agreement. Merely agreeing to act as surety for a charter party is not a maritime contract. *Pacific Surety Co.* v. *Leatham & Smith Towing & Wrecking Co.*, 151 F. 440, 443-44 (7 Cir. 1907). See also *Kossick* v. *United Fruit Co.*, 365 U.S. 731, 735 (1961). This suretyship therefore would be subject to the New York statute of frauds. Since National's alleged guarantee was not in writing, it would not be enforceable. N.Y. General Obligations Law §5-701 (2) (McKinney 1964). Thus, while it is impossible to determine National's status on the basis of this confused record, there was sufficient uncertainty to entitle National to a trial on this issue.

We emphasize that we do not decide today whether a valid charter agreement existed and whether National was a party to that agreement. We merely hold that appellants have shown enough to entitle them to a trial of these issues pursuant to §4 of the Arbitration Act. As in *El Hoss Engineer & Transport Co.* v. *American Independent Oil Co.*, *supra*, 289 F.2d at 351:

> "[T]here would appear to be issues of fact . . . . These issues should not be determined on affidavits, but rather a full trial should be had."

Reversed and remanded for further proceedings not inconsistent with this opinion.

Excerpts from Trial Transcript

[126] The Court: All right.

The question at issue here, as I understand, gentlemen, is whether or not there was in fact a contract made for the chartering of this ship as alleged in the pleadings here.

Mr. Estabrook: That is right. We are claiming an arbitration clause on or about March 17th.

The Court: That is the issue in this case and I take it that is the only issue I am here to decide.

Do you agree that is the only issue in this case, Mr. Gilchrist?

Mr. Gilchrist: I think there are two issues, your Honor, at least.

The Court: When are they? Is that the first? Do you concede that that is one of the issues? Is that one of the issues; yes or no?

Mr. Gilchrist: I prefer the Court of Appeals' formulation.

The Court: I hold then it is one of the issues.

Mr. Gilchrist: Whether there was a meeting of [127] the minds on all the essential terms.

The Court: On whether or not there was a contract created by the telex messengers. I hold that it's a matter of law, and I so rule. If you differ with me take your exception now.

Mr. Gilchrist: That is the issue.

The Court: That is one of the issues.

Mr. Gilchrist: Well, your Honor—

The Court: Either agree or take your exception. What do you do?

Colloquy

Mr. Gilchrist: I think I have to take an exception to the way it has been phrased, your Honor.

The Court: How would you phrase it?

Mr. Gilchrist: I would phrase it this way: I would say that the first issue in this case is whether in all of the conversations had between principals and the matters in writing exchanged between them there ever came into existence that meeting of the minds on all of the essential terms of the contract so as to result in an enforceable contract.

The Court: I will accept your phraseology. It is tantamount to what I said. I will accept it.

Mr. Gilchrist: The second issue in this case, your Honor, involves the role of National, because your [128] Honor could conceivably conclude that a fixture had been done but that it is not binding on National and without trying to get into it, I think the evidence emerging on that is a separate issue in the case.

The Court: I accept that as a second issue.

Any objection, Mr. Estabrook?

Mr. Estabrook: No.

The Court: And I would accept the two issues as stated by Mr. Gilchrist as being the only two issues before the court at this time on this trial.

Do you agree, Mr. Estabrook?

Mr. Estabrook: Yes, your Honor.

The Court: Do you agree?

Mr. Gilchrist: I will accept that formulation.

The Court: At least we know where we are headed, what we have to decide.

Opinion of Hon. Sylvester J. Ryan, U.S.D.J. dated February 28, 1974

HAIGHT GARDNER POOR & HAVENS, ESQS., New York, New York, Attorneys for Petitioner (JAMES M. ESTABROOK and LENNARD R. RAMSBUSCH, ESQS., of Counsel).

HILL BETTS & NASH, ESQS., New York, New York, Attorneys for Respondents (DAVID GILCHRIST and MARK JAFFE, ESQS., of Counsel).

RYAN, J.:

A formal trial of this non-jury proceeding to enforce arbitration was held by me following remand from the Second Circuit Court of Appeals to determine whether a binding contract had been entered into by the parties which, by its terms, requires them to arbitrate the question of whether there was a breach of the charterparty in suit by the defendants. See *Interocean Shipping Company* v. *National Shipping & Trading Corporation and Hellenic International Shipping, S.A.*, 462 F. 2d 673 (C.A. 2, 1973).

Petitioner herein had successfully moved in the District Court for an order compelling arbitration, but, on appeal by respondents, the Court of Appeals remanded the proceeding and directed the District Court to determine whether there was a charterparty in effect between the parties which would require them to arbitrate their dispute.[1] The Court of Appeals pointed out that a trial

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[1] Federal Arbitration Act, 9 U.S.C. 4. Section 4: "If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. * * *"

should determine whether in all the conversations between the parties there was a meeting of the minds which thereafter memorialized in a fixture letter or memorandum by which NATIONAL was bound.

Specifically, with respect to the question whether there was a meeting of the minds, the Court of Appeals held that this trial should determine whether the parties had agreed on drydocking, insurance and delivery range, and if they had not, whether these were such material items as to frustrate the existence of a contract; with respect to whether NATIONAL was bound, that this trial should determine whether the broker had authority to bind NATIONAL. NATIONAL was acting as agent for a disclosed principal—the charterer, HELLENIC—or was a guarantor of performance by Hellenic, the charter party, and, if a guarantor, whether the fixture letter was sufficient to satisfy the Statute of Frauds of New York as to such guarantee (N.Y. General Obligations Law, Section 5-701 (2), McKinney's 1964).

Petitioner urges that there was a binding charterparty under which NATIONAL was bound as guarantor and as parent of HELLENIC; respondents dispute this.

The overwhelming evidence, both testimonial and documentary, is that there was a charterparty agreement entered into by the parties, the essential terms of which were contained in the fixture letter which bound both, and that performance by the charterer HELLENIC was guaranteed by NATIONAL, and that the guarantee was set forth in the fixture letter signed by the broker, who was the agent for both parties. I find that, on March 17, 1971 the facts were as follow:

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dated February 28, 1974

Petitioner was a Liberian corporation and a wholly owned subsidiary of Bethlehem Steel Corporation, and the owner of the Liberian flag oil/ore carrier OSWEGO RELIANCE, a tank vessel of 49,283 dead weight tons; Anthony Germano was an employee of Steamship Service, Inc., a wholly owned subsidiary of Bethlehem Steel Corporation, which acted as the house broker for vessels owned by Bethlehem Steel Corporation or its subsidiaries; Respondent NATIONAL, a New York corporation, was in the business of operating and chartering tankers on behalf of various principals. The stock of NATIONAL was held in trust for the benefit of Harry Theodoracopulos, its Vice-President; Thomas Spears was President of NATIONAL; Respondent HELLENIC was a Panamanian corporation, the stock of which was owned by Hellenic Shipping & Industries, Ltd., of Greece. The principal shareholder of Hellenic Shipping & Industries, Ltd., of Greece was John Theodoracopulos, the father of Harry Theodoracopulos; the firm of Poten & Partners was a shipbrokerage firm in New York; Francis DeSalvo, presently Chief Executive Officer of Poten & Partners, was a broker employed by said firm; prior to joining Poten & Partners, DeSalvo had had five years' experience doing chartering work for Amoco.

Petitioner's principal witness, DeSalvo, testified that he had known Harry Theodoracopulos (H.T.) for many years and had had close business associations with him in the chartering of ships; that on March 17, 1971 he had lunch with H.T. at the latter's invitation, at which time they discussed the availability of a specific tanker and the general tanker market; that, upon DeSalvo's return to his office, he received a telephone call from H.T. inquiring as to the availability of the tanker and that he,

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dated February 28, 1974

DeSalvo, then called Germano at Steamship Service to ascertain whether the OSWEGO RELIANCE was available; that, upon being informed that it was, he relayed this message to H.T. and, upon asking him whether he was interested, H.T. replied in words to the effect, of "Yes, bring a firm offer in." DeSalvo then called Germano, requesting a firm offer which Germano did not give immediately because he wanted to look into the question of a guarantee from NATIONAL as he did not know HELLENIC; upon inquiry from Germano as to the identity of the charterer, DeSalvo had said it was "represented" by NATIONAL; Germano said that it would be necessary to see what arrangements could be given for guarantees and promised to call DeSalvo, which he did shortly after, offering the OSWEGO RELIANCE to DeSalvo "for reply 4:55 today"; DeSalvo's contemporaneous notes show as follows:

"Bethlehem Steel

National Shipping & Trading Reply 4:55 today
o/o Oswego Reliance
49,283 DWT 39′ 5/8″
16-1/2 knots 100 c cubic 1,968,842 98%
crude oil/or DBB max 3 grades net seg. max 135
coiled wing tanks only

"Del. 1 safe PG ex FA at charterers' option
Lay day March 31/April 15 ETA April 1
Redel. 1 safe PG owner's option
WW with IWL ex China, N.Vietnam, N. Korea,
Cuba, Israel and all other commie countries
Overtime and petties—$750/mo.
Rate: $5.75/ DWT/NW
Suitable drydock clause (scheduled Nov. 15 days)

Opinion of Hon. Sylvester J. Ryan, U.S.D.J.
dated February 28, 1974

1 year + 15 days
Mobil time sub-details
1-1/4 P & P 1 1/4 steam ship service"

DeSalvo relayed Germano's offer to H.T. at about 4 PM on March 17, 1971; H.T. made several counter offers orally on the telephone to DeSalvo, also "for reply 4:55 pm", which were relayed to Germano, who accepted some and rejected some, and these, in turn, DeSalvo relayed to H.T. DeSalvo's notes, made at the time of the telephone calls, reflect what the offers and counter offers were. The items which were being negotiated were charterhire, which H.T. proposed at $5.50 (Germano at $5.75); terms of the charter, 1 year plus or minus 30 days (Germano, 1 year, 15 days); and overtime and petties $500 (Germano, $750). H.T. also proposed that the Mobiltime form charter would exclude paragraphs 9, 12(a)II, 12(b)II and 12(b)III, and that a suitable drydock clause be worked out with sufficient advance notice. DeSalvo's notes also reflect that the charterer was to be HELLENIC, which H.T. had described to DeSalvo as a subsidiary of NATIONAL. H.T. at the time also inquired into the pumping capacity of the vessel; proposed a review of performance every six months; and inquired into the nature of the last two cargoes. All this took place at about 4 PM on March 17, 1971. H.T.'s counter offers were accepted by Germano with the exception of charterhire, which Germano quoted at $5.65 and $750 for petties to which H.T. countered with $5.55 hire and $600 for petties; Germano came back with $5.60 charterhire and $750 for petties. At about 4:45 p.m., DeSalvo transmitted this offer to H.T., who said in words to the effect "You are confirmed."

During these conversations DeSalvo had informed H.T. that Germano required a guarantee to which H.T. replied

that "appropriate guarantees" would be given and that HELLENIC was a subsidiary of NATIONAL. Following the conversations that same afternoon DeSalvo, through Poten and Partners, sent telexes to both parties confirming the fixture of the OSWEGO RELIANCE as follows: The telexes were identical except for the addressee and the statement of the commissions payable by INTEROCEAN to Poten and Partners.

"THEOTRAN NY (or BETHLEHEM NYC)
POTEN AND PARTNERS INC. MAR 17 1971
ATTEN:
MR. H. THEODORACOPULOS (or MR. TONY GERMANO)

CONFIRM HAVING FIXED FOR YOUR ACCOUNT TODAY AS FOLLOWS:
OWNER: INTEROCEAN SHIPPING COMPANY
CHARTERER: HELLENIC INTERNATIONAL SHIPPING S.A. OF PANAMA SUBSIDIARY OF NATIONAL SHIPPING AND TRADING WITH APPROPRIATE LETTER OF GUARANTEE
'OSWEGO RELIANCE'
49,283DWT 39 FT 5/8 INCHES DRAFT CUBIC 98 PERCENT 1,968,842
3 PUMPS 1300 TWPH EACH
16.5 KNOTS ON 100 BUNKER C PER DAY
DELIVERY/REDELIVERY PG EXCLUDING FAO AND ABADAN LAYCAN MARCH 31/APRIL 15 1971
ETA APRIL 1 1971 CRUDE AND/OR DPP MAX 3 GRADES WITHIN NATURAL SEGREGATIONS MAINTAINING HEATING 135 DEG F
COILED WING TANKS ONLY
TRADING WORLDWIDE WITHIN 1 WL EXCLUDING COMMUNIST COMMUNIST CONTROLLED CHINA, NORTH VIETNAM, NOR KOREA, CUBA
PERIOD ONE YEAR PLUS OR MINUS 30 DAYS
MOBILTIME EXCLUDING CLAUSES 9, 12AII, 12BII, 12BIII

Opinion of Hon. Sylvester J. Ryan, U.S.D.J.
dated February 28, 1974

"SUITABLE DRYDOCK CLAUSE TO BE WORKED OUT FOR NOVEMBER DRYDOCKING ABOUT 15 DAYS WITH PROPER NOTICE

PERFORMANCE REVIEW EVERY SIX MONTHS OVERTIME AND PETTIES $750. PER MONTH RATE 5.60 PER DWT PER MO PAYABLE U S DOLLARS IN NEW YORK

THANK YOU FOR THE OPPORTUNITY TO CONCLUDE THIS BUSINESS

THEOTRAN NY" (or BETHLEHEM N.Y. plus Commissions)

The telex to Theotran was received in the office of NATIONAL at 5:36 P.M. and studied by H.T. and Spears. On the trial, both testified that they understood it. H.T. also testified that he understood the word "fixed" to mean the conclusion of a negotiation; neither H.T. nor Spears called or telexed Poten & Partners back, commenting on or correcting the fixture telex.

On the following day, DeSalvo and Germano drew up a working copy of the charterparty and language for a drydocking clause; DeSalvo sent this copy of the charterparty to INTEROCEAN and NATIONAL on March 19; on March 18 or 19, DeSalvo inquired of H.T. if he wanted to offer the OSWEGO RELIANCE for subcharter, to which H.T. replied that he did for a single voyage at a certain rate to Chevron. DeSalvo was informed that Chevron would not consider the OSWEGO RELIANCE unless she had Tovalop insurance, which Bethlehem Shipping did not have at the time.[2] DeSalvo inquired of Germano if he would approach the

[2] Tanker Owners Voluntary Agreement concerning liability for oil pollution.

owners about entering the tanker into Tovalop. Germano told DeSalvo that this would require the entry of the entire fleet of Bethlehem in Tovalop; that, since it was Friday, it was too late to contact their insurers in London; and that he could have no answers from his principals until Monday, March 22. All of these negotiations were had with the knowledge of H.T., who had been the one to request of Germano, through DeSalvo, to provide such coverage for the Oswego Reliance. This was the first time that this insurance had been discussed or even mentioned. It formed no part of the Mobiltime Form Charter since this insurance did not come into effect until 1969 and the Mobiltime Form was printed in 1967. The Mobiltime Form was suggested by DeSalvo who, from his experience in fixing ships with H.T., knew that H.T. was familiar with it. The Mobiltime Form contained the arbitration clause, the words "sub-details" (i.e., subject to details in the telex), which DeSalvo testified meant in the industry "filling in the blanks", to supply the details of completing the charterparty form, e.g., the description of vessel, her fuel oil content, her speed, RPMs, the insurance valuation, in short, to fit the form to what had been orally agreed on so that "sub details" could vary from charter to charter depending on what details the parties had left to be filled in after agreement. DeSalvo testified quite clearly that, while the "details" might vary, "sub details" certainly did not mean subject to reviewing the whole negotiation again.

On March 23, Bethlehem Steel, because of the request of H.T. to obtain Tovalop for the Oswego Reliance, entered its entire fleet into Tovalop, according to the requirements of that insurer, and so notified DeSalvo, who informed H.T. of this, stating that it would be at charterer's ex-

pense. H.T. did not agree to this and "stood fast" on its being at owner's expense.

On or about March 18 or 19, Germano suggested wording for the drydock clause, which the fixture letter had left open for discussion, and DeSalvo inserted it into the copy of the charterparty. At that time, DeSalvo had asked H.T. to suggest some acceptable language, but he never did. A copy of the charterparty containing the following language was sent to both parties on March 19 and received by them at the latest on March 22:

> "11(b). Vessel requires drydock November 1971. It is the intention of the owners to drydock the vessel in Portugal, Spain or Japan and charter guarantees to place the vessel in position to drydock in any one of these countries."

As they had agreed in the fixture letter and as H.T. had requested Paragraph 12(a)II and (b)II and Paragraph 9 had been deleted. Paragraph 12(b)III recited the agreedon $750 for petties; delivery was fixed at a Persian Gulf Port excluding Fao and Abadan at owner's option; clause 23 which provided that owner would provide Protection and Indemnity Insurance (P & I) at its own expense, had been stricken; trading was limited to non-Communist controlled countries (Paragraph 3b).

Upon receipt of the charterparty on March 22, H.T. called DeSalvo and asked him to modify two clauses; to broaden delivery range to the Red Sea, which was agreed to by owner; and to permit trading with Communist China, which could not and was not agreed to by owner because the crew of the vessel was Nationalist China. H.T. made no comment about the language of the dry docking clause.

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About noon of March 23, 1971, H.T. went on vacation. During that afternoon, Spears told DeSalvo that the drydocking language was not acceptable because he was unwilling to guarantee the position of the vessel in November. Although DeSalvo asked him for language that he could pass on to the owners, it was not until 5:15 P.M. that Spears called DeSalvo with proposed language for the dry docking clause as follows:

> "Vessel requires drydocking about November, 1971, charterers will do all possible to position the vessel for discharge in the UKC MED or Far East area so that drydocking can be accomplished between October 15 and December 15, 1971."

In Spears' own words, this was language the charterer thought it "could live with" and he asked DeSalvo to transmit it to Germano. This was the exact language which appeared on DeSalvo's contemporaneous notes.

At 9 A.M. on March 24, Spears called DeSalvo and asked him if he had conveyed the proposed drydocking clause to Germano. When DeSalvo said he had not because he had received it after business hours, Spears told him not to pass it on.

Later that morning, DeSalvo called Spears and informed him that the owner had entered its fleet in Tovalop and that the cost of such coverage for the Oswego Reliance would be at the owner's expense as insisted upon by H.T.; and that it agreed to the language of charterer's drydocking clause.

About 11 A.M. of the same morning, Spears telexed DeSalvo repudiating the charter "due to the absence of meeting of the minds of the parties regarding all details necessary to a completed charter agreement."

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Later the same day, Poten & Partners sent a telex to charterers quoting a message from the owners to the effect that they were holding the charterer to the charter and that they considered the Oswego Reliance chartered, as follows:

> "IN RESPONSE TO YOUR TELEX OF MARCH 24, PLEASE ADVISE CHARTERERS THAT WE CONSIDER THE OSWEGO RELIANCE CHARTERED TO THEM AND SHALL HOLD THEM LIABLE FOR ANY DAMAGES THAT MAY RESULT FROM A BREACH OF THIS CHARTER. WE DISAGREE THAT THERE WAS NO MEETING OF THE MINDS RATHER AS IN NORMAL PRACTICE WE WERE ATTEMPTING TO ARRIVE AT MUTUALLY SATISFACTORY LANGUAGE FOR TWO RELATIVELY MINOR POINTS. AS YOU KNOW THE ITEM WHICH CAUSED THE MOST DELAY WAS TOVALOP. TOVALOP WAS SUBJECT THAT CAME UP A DAY OR TWO AFTER THE FIXTURE. THIS FIXTURE AS INDICATED IN YOUR TELEX CONFIRMATION OF MARCH 17 WAS FIXED ON THE BASIS OF MOBILTIME WHICH MAKES NO MENTION OF TOVALOP. AFTER YOU ADVISED THAT CHARTERERS WOULD HAVE DIFFICULTY WITHOUT TOVALOP, WE, IN THE SPIRIT OF COOPERATION—REGISTERED THE OSWEGO RELIANCE AND THE BALANCE OF OUR ORE/OIL FLEET IN TOVALOP FOR A PERIOD OF FIVE YEARS. WE ASSUMED THAT THE CHARTERER WOULD AT LEAST BEAR THE ONE YEAR TOVALOP COST OF THE OSWEGO RELIANCE. AT NO TIME WAS ANY LIMITATION PUT ON OUR EXCHANGES AND WE BELIEVE DISCUSSIONS PROCEEDED BETTER THAN NORMALLY FOR A CHARTER OF THIS DURATION.

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"IN ACCORDANCE WITH OUR VERBAL ADVICE PLEASE PREPARE THE CHARTER FOR OUR SIGNATURE IMMEDIATELY. AS WE ADVISED VERBALLY, YOU MAY ADD TO THE MOBILTIME DRYDOCKING CLAUSE THE ADDITION PROPOSED BY CHARTERER ON MARCH 22 AND WE AGREE TO PAY COST OF TOVALOP. FURTHER, YOU MAY ADD THE RED SEA AS A DELIVERY RANGE AS PER CHARTERERS EXPRESSED DESIRE ON MARCH 23 AND OUR AGREEMENT ON THAT DATE. THE OSWEGO RELIANCE IS DUE IN THE RED SEA AND/OR THE PERSIAN GULF ON APRIL 1. PLEASE IMPRESS UPON THE CHARTERER THAT WE SHALL PURSUE THIS MATTER VIGOROUSLY AND TO A CONCLUSION AND DO ANY AND ALL THINGS NECESSARY TO PROTECT OUR INTEREST.

"INTEROCEAN SHIPPING COMPANY"

On March 25, 1971, NATIONAL replied by Telex:

"WE HAVE PASSED ON THE CONTENTS OF INTEROCEANS MESSAGE OF MARCH 24, 1971 TO OUR PRINCIPALS AND HAVE BEEN INSTRUCTED TO REPLY AS FOLLOWS:

INTEROCEANS STATEMENTS ARE CLEARLY SELF SERVING, CONTRADICTORY TO THE CONCLUSIONS WHICH THEY PURPORT TO ESTABLISH AND CERTAINLY NOT CONSISTENT WITH ELEMENTARY PRINCIPALS OF CONTRACT LAW. INTEROCEAN ADMITS THAT THERE REMAIN POINTS WHICH WERE NOT AGREED UPON BY THE PARTIES. HELLENIC INTERNATIONAL DID NOT CONSIDER THESE POINTS MINOR. HELLENIC INTERNATIONAL CONSIDERED THESE OUTSTANDING POINTS AS INTEGRAL PARTS OF A PROPOSED AGREEMENT TO WHICH BOTH PARTIES MUST MUTUALLY

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AGREE IN ORDER TO HAVE A CONTRACT. THE SUBSEQUENT ATTEMPTS OF INTEROCEAN TO REVIVE THE NEGOTIATIONS BY OFFERING BELATED UNILATERAL AGREEMENT TO CERTAIN OF THE OUTSTANDING POINTS CERTAINLY ARE NOT CONTRACTUALLY EFFECTIVE. HELLENIC INTERNATIONAL RESPECTFULLY BUT VERY STRENUOUSLY REITERATES THAT THERE WAS NO MUTUAL MEETING OF THE MINDS ON ALL THE TERMS OF THE PROPOSED AGREEMENT, CONSEQUENTLY THERE IS NO CONTRACT. HELLENIC INTERNATIONAL ASSURES INTEROCEAN AND IMPRESSES UPON INTEROCEAN THAT IT IS COMMITTED AND IS READY, WILLING AND ABLE TO MOUNT A VIGOROUS DEFENSE TO PROTECT ITS PROPER INTERESTS.

NATIONAL SHIPPING AND TRADING CORP.
AS AGENT FOR HELLENIC INTERNATIONAL."

A copy of this telex was sent by it to counsel.

On March 24, 1971 Poten & Partners sent the charterparty form to the owners who executed it—but charterer refused to do so.

The formal charterparty form differed from the working copy in the three respects which had been the subject of the post fixture requests by H.T.:

1. To Paragraph 3(a) had been added that delivery could be "or Red Sea at Charterer's option provided no extra deviation involved."

2. Paragraph 11(b) had been added "vessel requires drydocking 4th quarter 1971 for approximately 15 days. Charterers will give owners as much advance notice as possible so as to posi-

tion vessel in order to coordinate drydocking this period."

3. A new Paragraph 38 had been added: "It is hereby agreed that the owner will register with Tankers Owners Voluntary Agreement concerning liability for Oil Pollution (Tovalop) with all costs pertaining to such to be for Owners account."

This was the charterparty which charterer refused to sign.

Between the date of the fixture and March 24, the tanker market fell drastically from $5.60 to $3.00 per ton. The fixture described as "consummated" of the OSWEGO RELIANCE had been published in two shipping publications listing vessels for the trade; this information had not been published at owner's request. One publication was dated March 13, 1971/March 20, 1971 the other, March 12, 1971/March 19, 1971. Respondent did not explain how the information of the fixture came to be reported.

It is clear that, if the fixture letter contained all the necessary elements on which the parties had agreed and if DeSalvo, who signed it, had authority on behalf of both parties, a binding contract came into effect at that time and it was not necessary that the parties execute a formal charterparty to be bound to all its terms including arbitration. *Kulukundis Shipping Co.* v. *Amtorg Trading Corp.*, 126 F. 2d 978 (C.A. 2, 1942); *Fisser* v. *International Bank*, 282 F. 2d 231 (C.A. 2, 1960).

DeSalvo was an independent broker, who had done business for many years with H.T. and who, although he

stood to earn a good commission from the owner, was not employed by it. His testimony, which was consistent and perfectly credible, was supported by his contemporaneous notes, as well as by a sworn statement which had been taken of him by counsel for owners on April 6, 1971 when events were fresh in his mind. I find his testimony that he had been authorized by both parties to close the deal through the fixture letter, after negotiations on all major points had been concluded, substantiated by the evidence and the custom and practice of the shipping business.

DeSalvo's authority to deal on behalf of charterers as well as owners was established from the language of the fixture letter sent to each "for your account"; from the numerous offers and counter offers transmitted through him to each, including the attempted repudiation; from his past business association with H.T. when he had "fixed" ships for National or HELLENIC; from the request of H.T., "bring me a firm offer", as well as from his statement, "You are confirmed". I also find it established by the custom of the trade.

An integral part of the negotiations for the fixture was the letter of guarantee to secure performance of the charter by HELLENIC, a charterer with whom INTEROCEAN had had no prior dealings. This was a prudent condition in light of subsequent events. No limit was placed on DeSalvo's authority in this respect; in fact, he expressly stated in the fixture letter that this was part of the agreement to which H.T. had not only made no objection but had answered that an appropriate guarantee would be given. This is admitted by Respondent. DeSalvo had, in the past on a previous fixture acting for this charterer, procured a guarantee of HELLENIC's performance.

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The commitment to supply the guarantee was but one of the details of the fixture, not unusual in the shipping business. DeSalvo had actual as well as apparent authority to bind the charterer to it. *Christman* v. *Maristella Compania Naviera,* 349 F. Supp. 845, 851; aff'd 468 F. 2d 620 (1972); *Restatement of the Law of Agency,* 2nd Series, Sec. 34; *Carver, Carriage by Sea,* 12th Ed., Vol. 1, Sec. 335.

I also find that it was the understanding of the parties, through DeSalvo and H.T., that NATIONAL would give the guarantee on behalf of HELLENIC and so bind itself to the charterparty.[3] It is true that the fixture letter did not specifically state that the guarantee would be given by NATIONAL, but the testimony is clear that this was the only guarantor which the parties had in mind. The fixture letter did read: "Charterer: Hellenic International Shipping S.A. or Panama, Subsidiary of National Shipping and Trading. With Appropriate Letter of Guarantee." DeSalvo's notes stated that HELLENIC was a subsidiary of NATIONAL. It is uncontradicted that H.T. (who was NATIONAL) agreed to give an appropriate guarantee. The testimony and the record disclose that DeSalvo, who had known H.T. for many years, considered him to be NATIONAL as he was the "owner" and its principal stockholder. H.T.'s father was the principal stockholder of HELLENIC. HELLENIC had no office here,

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[3] The guarantee was not recited in the charterparty because it was no part of it; the guarantee of performance was really a separate agreement. Discussion on this point is limited to whether NATIONAL should be a party to this suit as surety of the charterparty made by HELLENIC, one of the issues raised by the Court of Appeals. But see *Dover SS Co.* v. *Summit Industrial Corp.,* 148 F. Supp. 206, holding this to be a question for the arbitrator.

but all business and correspondence went through NATIONAL's offices and H.T. was HELLENIC's attorney in fact. Although NATIONAL denies that it was the parent of HELLENIC, the fixture letter, DeSalvo's notes, and his sworn statement all describe this relationship. H.T., upon receipt of the fixture letter, did not correct this statement and, in fact, DeSalvo's notes evidence that this information was supplied to him by H.T. H.T. testified:

> "I . . . probably did tell Mr. DeSalvo that the charterer would be either National Shipping or Hellenic International".
>
> "I told him the charterer would be National Shipping, implying that we would have authority by another subsidiary company to do so, or Hellenic International."
>
> The Court: "But you didn't say anything about another subsidiary, did you?"
> The Witness: "Not to my recollection . . . ."

Spears testified, on cross-examination:

> "A. It was my understanding that Bethlehem Steel or the owners, I should say, wanted a guarantee of National Shipping & Trading Corporation."

The form of guarantee, which DeSalvo prepared but which was never sent by him to H.T. because, as he testified, it could await the execution of the charter, was similar to one that had been used on a prior charterparty obtained by DeSalvo for HELLENIC, executed by John Theodoracopulos on behalf of HELLENIC, and attached to a letter agreement on letterhead of both HELLENIS and National, signed by H.T. as attorney in fact for HELLENIC,

who had also signed that prior charterparty on behalf of HELLENIC.

The letter guarantee prepared by DeSalvo was for execution by "Harry Theodoracopulos, National Shipping & Trading Co."

I find that NATIONAL was to be the surety for the performance of HELLENIC and thus liable as a respondent for the non -performance of HELLENIC; this, irrespective of the role it may have played as agent for HELLENIC in negotiating the charterparty. It was in the business of negotiating for its subsidiaries.

I also find that the fixture note represented this understanding by the parties and that it was sufficient to bind NATIONAL to a guarantee through its agent, DeSalvo, even though the formal guarantee was never executed.

Certainly in the modern business world and particularly in the shipping business where speed of negotiations is of the essence (here the OSWEGO RELIANCE was to be delivered on April 1), telecommunications and particularly telexes (used so regularly in the shipping world) are a sufficient "note or memorandum in writing to answer for the default of another." *Christman* v. *Maristella Compania Naviera, supra*; Sec. 5-701, *General Obligations Law*; *Trevor* v. *Wood,* 36 N.Y. 307 (1867).

"Telegrams and teletype messages, too, are sufficient," says Professor Williston in his Treatise on Contracts, 3rd Ed., Sec. 468. The California Court, applying a statute of frauds similar to the New York statute took judicial notice of the extensive use of teletype machines being used among business brokers and found that such a message satisfied the required writing. *Joseph Denunzio Fruit Co.* v. *Crane,*

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79 F. Supp. 117 (S.D., Cal., 1948), 188 F. 2d 569 (9th Cir., 1949) *cert. den.* 342 U.S. 820.

I find that the telex which contained the clause requiring the guarantee was the contract between the parties; I find that DeSalvo had authority to act for both; and, since DeSalvo signed the telex, I conclude that the guarantee was in writing signed by the agent of the party to be charged, NATIONAL.

The fact that the fixture letter had left the drydocking clause to be worked out does not mean that the parties had not reached a meeting of the minds on this charter.

The testimony of both sides on this point makes it clear that both considered this a point subject to acceptable solution at the proper time. In fact, it was owners who wanted to reach a firm decision on the detail of the drydocking and who suggested the language which was eventually negotiated, and not HELLENIC. It was not until after the principal negotiator, H.T., had gone on vacation and not until the close of business on March 23 that Spears communicated to DeSalvo language he thought they "could live with". The language suggested by Germano was in the working copy of the charterparty form sent both parties, which was received by H.T. on March 22; and, although he requested two changes, he made no comment about the drydocking clause and never suggested any modification of it.

The testimony of DeSalvo was that, in his experience, this was a clause, the details of which could be and often were worked out in the future by the parties; and that the essential facts, such as duration of drydocking and the approximate date, which were important to the trading range, of the vessel had been agreed upon. Petitioner's

experts, both highly qualified men in the shipping and brokerage business, testified that any deviation in getting the ship to drydock was at owner's expense; in fact, the charterparty so provided here in Paragraph 11(a); that it was not unusual to leave that clause to be worked out at a later time, depending on where the vessel might find herself; and that the clause proposed by owners—Europe or Japan—would not seriously affect the trading range of the Oswego Reliance since both of these countries were on the route usually plied by oil tankers which traveled Persia Gulf-Europe or Persia Gulf-Japan. It was also their testimony that they had never known of a charterparty to fall apart over drydocking, and that the charterer can arrange his voyage to his profit so that, at about the time the vessel must be in drydock, it is carrying cargo en route.

The testimony of Repondent's expert was to the same effect: that the "custom under the clause would have been for the charterers and owners to discuss some time before November the probable place of drydocking for the charterer to give the owner an idea as to the intended trades so that they would know about where the vessel would be in November."

H.T.'s testimony was that drydocking is worked out "after you know where the ship is going to be about that time", "the place, the exact date is negotiated after the employment of the ship is known." It appears from the testimony that H.T. preferred not to work out a drydocking clause at that time because he testified he could not schedule his ship to be in a certain place eight months hence. Since the choice was his and since the cost was owner's, he was in no hurry to make definite arrangements for drydocking. He also admitted that "sub-details"

was a common expression in fixtures, and that DeSalvo, on the telephone on March 17 prior to preparing the fixture, had read to him the details of the vessel, etc., as noted in DeSalvo's contemporaneous notes.

Neither Spears nor H.T. had any handwritten notes or diary entries relating to the numerous communications and telephone calls with DeSalvo on this and other business which totalled about 500 calls a year. In fact, H.T. testified that he had made notes about the OSWEGO RELIANCE in a book which contained notes about numerous other matters but that he had thrown them out even though the matter had been referred by him to counsel as early as March 24. H.T. testified that the word "fixed" in DeSalvo's telex meant to him the "conclusion of a negotiation". Spears found the clause relating to drydocking "clear", in fact everything clear except the description of HELLENIC as subsidiary; but made no comment to DeSalvo about this confusion.

I conclude that the drydocking clause was firmly agreed on by the fixture; that it was to the owner's interest to settle it at the time; that, as far as respondent was concerned, he was perfectly content to leave the details to be worked out at a later time depending on where the vessel was; that this was performance which was not to take place for eight months but that the essential terms of the performance had been agreed upon leaving for the future only more precise terms.

In *V'Soske* v. *Barwich,* 404 F. 2d 495 (C.A. 2, 1968), cert. den. 394 U.S. 921 (1969), the Court held that a contract for the sale of a business was not defeated because the parties had not agreed on the valuation of the net worth of the business to be sold, because the term had an established meaning and could be worked out by the parties.

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> "If the contract cannot be performed without settlement of the undetermined point, each party will be bound to agree to a reasonable determination of the unsettled point in order that the main promise may be enforced." *Williston on Contracts,* 3rd Ed., Sec. 48, p. 157.

So long as the undecided matter is not so essential as to frustrate the purpose of the charter, the charter will be enforceable. *Aaby* v. *States Marine Corp.,* 181 F. 2d 383.

The question of insurance never came up between the parties until charterer attempted to sub-charter the vessel, an act entirely inconsistent with its claim that it never had a charter on the Oswego Reliance. The evidence relating to Clause 23, which had been deleted from the Mobiltime Form charter in the working copy as well as in the original, was that P & I was totally unnecessary in view of the fact that Bethlehem Steel was a self-insurer in a more than adequate amount to protect charterer. The deletion of Clause 23 was never discussed by the parties; they both knew it was not applicable. Certainly had the charterer not known that insurance was provided by Bethlehem Steel, it would have raised that important point immediately upon receipt of the copy of the charterparty, when it saw that Clause 23 had been deleted. The conclusion is inescapable that Hellenic and National both knew the facts about the insurance carried by Bethlehem Steel. That it had a good reputation for solvency and financial responsibility, was conceded by Respondent's expert.

Tovalop was a different matter. It was not the usual P & I insurance and would never have been discussed but for the fact that National or Hellenic could not sub-charter the Oswego Reliance without having Tovalop.

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At no time during the conversation with DeSalvo from lunchtime on through that afternoon of March 17, when offers and counter offers on matters were going back and forth through DeSalvo, through the time that DeSalvo sent the fixture, and the following day, March 19, was Tovalop or any insurance ever mentioned. It was only when H.T. authorized DeSalvo to subcharter the Oswego Reliance for Hellenic that, for the first time, he requested DeSalvo to seek Tovalop from the owners.

It was not a condition precedent, nor even a condition subsequent, that Hellenic be able to subcharter the Oswego Reliance. DeSalvo testified, and this Court agrees, that, even if Bethlehem Steel had refused to obtain Tovalop, he considered that there was a charter on the Oswego Reliance. The fact that Hellenic could not profit from a subcharter at that time was of no concern to owners. When owners procured Tovalop and even went so far as to agree to pay for it, they were doing more than the charter required, obviously in the interests of good will which meant good business and undoubtedly also because DeSalvo had intimated that, without Tovalop, Hellenic would not perform the charter. The subcharter to Chevron, which H.T. authorized DeSalvo to offer on March 18 or 19, coupled with the insistence that owners procure Tovalop, is evidence that Hellenic considered itself bound under the charter and wanted to profit from it by the subcharter. *Beech Aircraft Corp.* v. *Flexible Tubing*, 270 F. Supp. 548. Spears testified "we had to conclude the sub-charter." Both experts for Respondent testified that it was not good practice to subcharter a vessel until you have a charter; that it was like selling stock which one does not own. Bethlehem Steel would probably not have requested Tovalop cover-

age with such urgency and on such short notice unless it considered to have chartered the OSWEGO RELIANCE. It was not only the OSWEGO RELIANCE that it covered, but its entire fleet under the provisions of Tovalop.

The fact that it did add Clause 35 to the charterparty, which was an addition of substance, was had to save a business deal; was done at the insistence of the charterer; and may not be turned around now to attack the fixture for vagueness.

Parties to a contract are always free to make changes or endeavor to make things more comfortable or profitable for each other, without risking attack on the contract as a contract. 1 CORBIN ON CONTRACTS, Sec. 85, 1936 Ed.; 1 WILLISTON ON CONTRACTS, Sec. 79 (1957 Ed.).

The fixture letter contained all the essential terms of the contract which had been orally agreed on. It is binding on all parties. It incorporated the Mobiltime Form charter, which contained the arbitration clause which is binding on all the parties. *Kulukundis Shipping Co.* v. *Amtorg Trading Corp., supra; Dover Steamship Co.* v. *Summit Industrial Corp., supra.*

The petition to compel arbitration is granted; and the parties are directed to forthwith settle an order designating arbitrators.

Dated: New York, New York
February 28, 1974.

SYLVESTER J. RYAN,
United States District Judge.

Opinion of Court of Appeals
Decided June 24, 1975

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 223—September Term, 1974.

(Argued November 26, 1974 Decided June 24, 1975.)

Docket No. 74-1713

INTEROCEAN SHIPPING COMPANY,

Petitioner-Appellee,

v.

NATIONAL SHIPPING AND TRADING CORPORATION and HELLENIC INTERNATIONAL SHIPPING, S.A.,

Respondents-Appellants.

Before:

CLARK, *Associate Justice,** and
MOORE and TIMBERS, *Circuit Judges.*

Appeal from order entered in the Southern District of New York, Sylvester J. Ryan, *District Judge,* granting vessel owner's petition pursuant to the Federal Arbitration Act to compel arbitration of its claim for breach of of a charter party.

Order modified and affirmed.

DAVID I. GILCHRIST, New York, N.Y. (Eli Ellis, Mark M. Jaffe and Hill, Betts & Nash, New

* Hon. Tom C. Clark, Associate Justice, United States Supreme Court, Retired, sitting by designation.

York, N.Y., on the brief), *for Respondents-Appellants.*

JAMES M. ESTABROOK, New York, N.Y. (Lennard K. Rambusch, Stephen R. Remsberg and Haight, Gardner, Poor & Havens, New York, N.Y., on the brief), *for Petitioner-Appellee.*

TIMBERS, *Circuit Judge:*

On this appeal from an order entered April 15, 1974 after a four day hearing in the Southern District of New York, Sylvester J. Ryan, *District Judge,* pursuant to the remand ordered in our prior decision, *Interocean Shipping Co.* v. *National Shipping and Trading Corp.,* 462 F.2d 673 (2 Cir. 1972), to determine whether there existed a valid charter party which contained a provision requiring the parties to arbitrate whether there was a breach of the charter party, the essential questions are:

(1) Whether the findings of fact of the district court that a valid charter party did exist were clearly erroneous.

(2) Whether the findings of fact of the district court that De Salvo, the charter broker, had authority to act for appellants were clearly erroneous.

(3) Whether the district court erred in ordering National Shipping and Trading Corporation, the guarantor of the charter party, to arbitrate.

For the reasons below, we affirm the district court's findings of fact with respect to questions (1) and (2) as not clearly erroneous; but, with respect to question (3), we modify its arbitration order by eliminating the direc-

tion that National proceed to arbitration. We affirm the district court's arbitration order as modified.

I. Facts and Prior Proceedings

This is the second time in three years that this petition to compel arbitration pursuant to Section 4 of the Federal Arbitration Act, 9 U.S.C. §4 (1970), has been before us. On the instant appeal, the essential issues are (1) the correctness of the district court's findings of fact pursuant to the remand ordered in our prior decision, and (2) the scope of its direction to arbitrate.

In view of the comprehensive statement of facts set forth in the district court's opinion,[1] we shall summarize only those facts necessary to an understanding of our rulings on the issues stated above.

The dramatis personae includes:

> Appellee Interocean Shipping Company (Interocean) was a Liberian corporation and a wholly-owned subsidiary of Bethlehem Steel Corporation (Bethlehem). Interocean owned the tanker, the Oswego Reliance, which is the subject of the aborted charter party here at issue.
>
> Anthony Germano was an employee of Steamship Service, Inc., another wholly-owned subsidiary of Bethlehem, which acted as house broker for vessels owned by Bethlehem and its subsidiaries.
>
> Appellant National Shipping and Trading Corporation (National) was a New York corporation engaged in chartering and operating tankers on behalf of various principals. The stock of National was held in

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1 The district court's opinion dated February 28, 1974 is not officially reported.

We assume familiarity with the facts and prior proceedings set forth in our prior opinion. 462 F.2d 673.

trust for the benefit of Harry Theodoracopulos (H.T.), its vice-president. Thomas Spears was president of National.

Appellant Hellenic International Shipping, S.A. (Hellenic), was a Panamanian corporation which was wholly-owned by Hellenic Shipping & Industries, Ltd., of Greece. The principal shareholder of the latter was John Theodoracopulos, the father of H.T.

Francis De Salvo was a broker employed by the ship brokerage firm of Poten & Partners, Inc., in New York City. De Salvo had known H.T. for many years and through him had negotiated several previous charters with National.

On March 17, 1971, H.T. invited De Salvo to lunch to discuss the tanker market. A specific unnamed vessel was discussed. This apparently was the Oswego Reliance. After lunch, H.T. called De Salvo and asked him to check on the vessel's availability for charter.

De Salvo then contacted Germano of Steamship Service concerning the Oswego Reliance. De Salvo relayed to H.T. the message that it was available for charter. H.T. told De Salvo "to bring a firm offer in."

De Salvo again contacted Germano who was hesitant to give a firm offer since he was not familiar with Hellenic, the proposed charterer. Germano told De Salvo that it would be necessary to determine what arrangements could be made for a guarantee from National, that he would have to check with his people, and that he would call back De Salvo.

Shortly thereafter, Germano called De Salvo as promised. He offered the Oswego Reliance "for reply 4:55 today". De Salvo wrote down Germano's terms and relayed them to H.T. by telephone. There followed several offers and counter-offers by H.T. and Germano, all relayed

through De Salvo. At 4:45 P.M. that day, in response to one of Germano's counter-offers relayed to H.T. through De Salvo, H.T. said to De Salvo in substance, "You are confirmed."

Throughout these and the subsequent negotiations, De Salvo kept notes which were received in evidence. De Salvo's notes indicate that the terms being negotiated through him were charterhire, the length of the charter, and overtime and petties; that the charterer would be Hellenic; that the Mobiltime form charter "sub details" [2] would be used, excluding certain clauses; and that a suitable drydock clause would be worked out with sufficient advance notice. Other terms also were reflected in the notes.

During the negotiations, De Salvo informed H.T. that Germano required a guarantee. H.T. replied that "appropriate guarantees" would be given and that Hellenic was a subsidiary of National.

Following the negotiations, De Salvo sent telexes to both parties confirming the fixture of the Oswego Reli-

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2 Clause 37 of the Mobiltime form contained the arbitration clause which Interocean seeks to enforce:

> "Any dispute arising under this Charter shall be settled by arbitration in New York/London. The party requesting arbitration shall serve upon the other party a written demand for arbitration with the name and address of the arbitrator appointed by it, and such other party shall within twenty (20) days thereafter appoint an arbitrator, and the two arbitrators so named, if they cannot agree, shall appoint a third, and the decision or award of any two shall be final and binding upon the parties. Should the party upon whom the demand for arbitration is served fail or refuse to appoint an arbitrator within twenty (20) days, the single arbitrator shall have the right to decide alone, and his decision or award shall be final and binding upon the parties. The arbitrators shall have the discretion to impose the cost of the arbitration upon the losing party, or divide it between the parties on any terms which may appear just. Any decision or award rendered hereunder may be made and entered as a rule or judgment of any Court, in any country, having jurisdiction."

ance and setting forth the agreed upon terms (the fixture telex).[3]

The telex was received by National at 5:36 P.M. It was studied by H.T. and Spears. Both testified that they understood it, including its use of the term "fixed" which meant the conclusion of a negotiation. Neither H.T. nor

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3 The telexes were identical except for the addressees and a notation concerning commissions payable by Interocean to Poten & Partners:

"THEOTRAN NY [or BETHLEHEM NYC]
POTEN AND PARTNERS INC MAR 17 1971
ATTEN:
MR. H. THEODORACOPULOS [or MR. TONY GERMANO]
CONFIRM HAVING FIXED FOR YOUR ACCOUNT TODAY
AS FOLLOWS:
OWNER: INTEROCEAN SHIPPING COMPANY
CHARTERER: HELLENIC INTERNATIONAL SHIPPING
S.A. OF PANAMA SUBSIDIARY OF NATIONAL SHIPPING
AND TRADING WITH APPROPRIATE LETTER OF
GUARANTEE.
'OSWEGO RELIANCE'
49.283 DWT 39 FT 5/8 INCHES DRAFT CUBIC 98 PERCENT
1,968,842
3 PUMPS 1300 TWPH EACH
16.5 KNOTS ON 100 BUNKER C PER DAY
DELIVERY/REDELIVERY PG EXCLUDING FAO
AND ABADAN LAYCAN MARCH 31/APRIL 15 1971
ETA APRIL 1, 1971 CRUDE AND/OR DPP MAX 3
GRADES WITHIN NATURAL SEGREGATIONS
MAINTAINING HEATING 135 DEG F
COILED WING TANKS ONLY
TRADING WORLDWIDE WITHIN IWL EXCLUDING
COMMUNIST COMMUNIST CONTROLLED CHINA,
NORTH VIETNAM, NOR KOREA CUBA
PERIOD ONE YEAR PLUS OR MINUS 30 DAYS
MOBILTIME EXCLUDING CLAUSES 9, 12AII, 12BII 12BIII
SUITABLE DRYDOCK CLAUSE TO BE WORKED
OUT FOR NOVEMBER DRYDOCKING ABOUT 15
DAYS WITH PROPER NOTICES
PERFORMANCE REVIEW EVERY SIX MONTHS
OVERTIME AND PETTIES $750. PER MONTH
RATE 5.60 PER DWT PER MO PAYABLE U S
DOLLARS IN NEW YORK
THANK YOU FOR THE OPPORTUNITY TO
CONCLUDE THIS BUSINESS
THEOTRAN NY [or BETHLEHEM NYC plus Commissions]"

Spears contacted Poten & Partners to comment on or to correct the fixture telex.

All of the above events took place on the afternoon of March 17, 1971. No direct communication between H.T. and Germano ever took place. All negotiations were conducted through De Salvo.

On the next day, March 18, De Salvo and Germano drew up a working copy of the charter party and a proposed drydock clause. This clause required the charterer to guarantee to place the vessel in a position so that it could be drydocked in November 1971 in Portugal, Spain or Japan. These documents were sent to Interocean and National the following day.

H.T. received the proposed charter party on Monday, March 22. He called De Salvo and asked him for two modifications: (1) to broaden the delivery range from the Persian Gulf to include the Red Sea; and (2) to permit trading with Communist China. Interocean agreed to the first modification but could not agree to the second because the crew was Nationalist Chinese. H.T. made no mention of the drydock clause.

Backing up for a moment, on March 18 or 19, De Salvo had asked H.T. if he wanted to subcharter the Oswego Reliance. H.T. replied that he wanted to subcharter the vessel to Chevron for a single voyage. Chevron, however, would not consider the vessel unless she had Tovalop[4] insurance which she did not. H.T. requested De Salvo to ask Germano to obtain such coverage for the Oswego Reliance.

This was the first time Tovalop had been mentioned. The Mobiltime form charter was printed in 1967. It did not refer to Tovalop which did not come into effect until 1969.

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4 Tovalop is an acronym for Tanker Owners Voluntary Agreement which relates to liability for oil spills.

De Salvo relayed H.T.'s request to Germano on Friday, March 19. Germano informed De Salvo that the entry of the Oswego Reliance into Tovalop would require the entry of Bethlehem's entire fleet and that he would have to check with his principals.

On Tuesday, March 23, Bethlehem acceded to H.T.'s request and entered its entire fleet into Tovalop. Germano so informed De Salvo who relayed the information to H.T. Bethlehem stated that the cost was to be at charterer's expense but H.T. insisted that it be at owner's expense.

Returning to the drydock clause, it was not until the afternoon of March 23, after H.T. had gone on vacation, that Spears informed De Salvo that this clause was unacceptable because he was unable to guarantee the position of the vessel in November 1971. De Salvo then asked for a counter-proposal to give to the owners. Spears did not give De Salvo a proposed clause until about 5:15 P.M. That proposed clause provided that the charterer would "do all possible" to place the vessel "in the UKC MED or Far East area" for drydocking between October 15 and December 15, 1971.

Although Spears had told De Salvo that this clause was one which Hellenic "could live with," at 9 A.M. the next morning, March 24, he called De Salvo and asked him whether he had conveyed the clause to Germano as yet. De Salvo said that he had not because it had been received after business hours the previous day. Spears then told De Salvo not to transmit the clause to Interocean, that the deal was finished, that there was no agreement to charter the Oswego Reliance and that it was too late for an agreement.

Nevertheless, later that same morning, De Salvo called Spears and informed him that Interocean had agreed to bear the cost of Tovalop as H.T. had insisted and that

Interocean had agreed to the language of Spears' drydock clause.

At about 11 A.M. on March 24, National telexed De Salvo as follows:

> "YOU HAVE BEEN PREVIOUSLY ADVISED THAT DUE TO THE ABSENCE OF MEETING OF THE MINDS OF THE PARTIES REGARDING ALL DETAILS NECESSARY TO A COMPLETED CHARTER AGREEMENT NEGOTIATIONS HAVE BEEN TERMINATED WITHOUT MUTUAL AGREEMENT."

The telex further stated that De Salvo's last attempt to agree belatedly to disputed contractual details "in no way is binding or agreeable to our principals since negotiations terminated earlier." De Salvo telexed this message to Germano.

Later that same day, Interocean sent a telex to Poten & Partners to be relayed to National. This telex stated that Interocean considered the Oswego Reliance chartered and intended to hold the charterers to the charter party. It rejected National's claim that there was no meeting of the minds:

> "RATHER AS IS NORMAL PRACTICE WE WERE ATTEMPTING TO ARRIVE AT MUTUALLY SATISFACTORY LANGUAGE FOR TWO RELATIVELY MINOR POINTS."

The telex went on to state that the "item which caused the most delay was Tovalop" which "came up a day or two after the fixture" which did not mention Tovalop. The telex noted that in the "spirit of cooperation" Bethlehem had entered its entire fleet in Tovalop, and added:

"AT NO TIME WAS ANY LIMITATION PUT ON OUR EXCHANGES AND WE BELIEVE DISCUSSIONS PROCEEDED BETTER THAN NORMALLY FOR A CHARTER OF THIS DURATION."

Interocean directed Poten & Partners to prepare for Interocean's signature the charter party which was to include National's proposals concerning delivery and drydocking.

On March 25, 1971, National replied by telex that it had transmitted Interocean's message to its principals and had been "instructed to reply" that Interocean's statements were self-serving and contrary to elementary contract law, that Hellenic had reiterated that there had been no meeting of the minds and that the unsettled points were not minor:

"HELLENIC INTERNATIONAL CONSIDERED THESE OUTSTANDING POINTS AS INTEGRAL PARTS OF A PROPOSED AGREEMENT TO WHICH BOTH PARTIES MUST MUTUALLY AGREE IN ORDER TO HAVE A CONTRACT."

The telex was signed "National Shipping and Trading Corp. as agents for Hellenic International." National sent a copy of this telex to its counsel.

On March 24, Poten & Partners had sent the charter party which it had prepared to Interocean which executed it. When it was presented to National and Hellenic, they refused to execute it.[5]

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5 It is significant to note that this charter party dispute probably is attributable to the state of the tanker market at the time of these events. Between March 17 and March 24, 1971, the tanker market fell drastically from $5.60 (the rate for this charter) to $3.00 per deadweight ton per month. If Hellenic planned, as it apparently did, to subcharter the tanker, which was to be delivered between March 31 and April 15, 1971, it was destined to sustain a substantial loss if forced to adhere

By letter dated May 20, 1971, Interocean demanded that Hellenic and National proceed to arbitration in accordance with the terms of the charter party alleged to have been agreed to on March 17, 1971. They refused to do so. On July 28, 1971, Interocean filed a petition in the Southern District of New York to compel arbitration pursuant to the terms of the Mobiltime charter party, and claimed $1.4 million damages caused by appellants' alleged breach of the charter party. Appellants' answer denied that any agreement existed and demanded a trial.

On December 30, 1971, the district court held, on the basis of affidavits alone, that the making of the arbitration agreement was not in issue and granted Interocean's petition.

On June 23, 1972, we reversed the district court's order and remanded for further proceedings. 462 F.2d 673. We concluded that the making of the arbitration agreement was in issue within the meaning of Section 4 of the Federal Arbitration Act, 9 U.S.C. §4 (1970). 462 F.2d at 676-78. In reaching this conclusion, we found that there was enough evidence in the record to entitle National and Hellenic to a trial on whether a valid charter agreement existed and whether National was a party to that agreement. 462 F.2d at 678. We held that there were essentially three issues of fact to be determined:

(1) Whether there was a meeting of the minds of the parties with respect to the essential terms of a charter party. 462 F.2d at 676-77.

(2) Whether Poten & Partners had authority to bind National and Hellenic to the charter party. 462 F.2d at 677.

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to this charter party. On the other hand, the charter party was extremely favorable to Interocean under prevailing market conditions. Understandably, Hellenic wanted out. Interocean wanted in.

(3) Whether National was a party to the charter party and hence a party to the arbitration agreement contained therein. 462 F.2d at 677-78.

On remand, the district court held a four day evidentiary hearing in April and May 1973. On March 4, 1974 it filed a comprehensive opinion in which it concluded:

> "The overwhelming evidence, both testimonial and documentary, is that there was a charterparty agreement entered into by the parties, the essential terms of which were contained in the fixture letter which bound both, and that performance by the charterer HELLENIC was guaranteed by NATIONAL, and that the guarantee was set forth in the fixture letter signed by the broker, who was the agent for both parties. . . ."

The court granted the petition to compel arbitration and directed both National and Hellenic to proceed to arbitration in accordance with the Mobiltime charter arbitration clause.

The instant appeal by National and Hellenic followed.

II. Existence of the Charter Party

The principal question of fact before the district court on remand was whether a valid charter party existed, i.e. whether there was a meeting of the minds on its essential terms. 462 F.2d at 676-77. The court answered this question in the affirmative. It found that there was an oral meeting of the minds on March 17, 1971, which was reflected in the fixture telex sent to both parties by De Salvo on the same day. We agree.

Whether there was a meeting of the minds is a question of fact. Appellants urge that we set aside the findings of

fact of the district court as clearly erroneous under Fed. R. Civ. P. 52(a). We decline to do so. The factual determinations were made by an able and experienced trial judge. Our careful review of the entire record satisfies us that Judge Ryan's findings that a valid charter party existed were not clearly erroneous. They were supported by substantial evidence.

Issues of Credibility

The court's findings were based in large measure on its resolution of issues of credibility with respect to witnesses called by both sides. The task of resolving conflicting testimony is peculiarily within the province of the trial court. *In the Matter of Grace Line Inc.*, —— F.2d —— (2 Cir. 1975), slip op. 3601, 3604 (May 19, 1975); *Kulukundis Shipping Co.* v. *Amtorg Trading Corp.*, 126 F.2d 978, 980 (2 Cir. 1942). For example, the trial court was in the best position to evaluate H.T.'s destruction of his notes concerning this transaction even after he had notified his attorneys of the impending dispute. And all of the testimony appropriately was weighed in light of the falling tanker market. See note 5, *supra*.

Differences Between Telex and Working Copy of Charter Party

Many of appellants' claims of error are directed at differences between the telex and the working copy of the charter party prepared by De Salvo and Germano and sent to H.T. on March 19. They relate to such details as trading limits, speed, performance, penalties and mode of payment. We believe that the terms of the telex or De Salvo's notes embodying the proposal which were relayed by De Salvo to H.T. during the course of the negotiations should be viewed as having merged in the subsequent written docu-

ment, whether favorable to one side or the other. The party that wanted a provision which was omitted or altered could have pressed for its inclusion in the final written instrument. *Christman* v. *Maristella Compania Naviera,* 349 F.Supp. 845, 854 (S.D.N.Y. 1971), *aff'd on district court opinion,* 468 F.2d 620 (2 Cir. 1972). The differences upon which appellants focus on appeal did not vitiate the agreement which the district court found the parties had reached through De Salvo on March 17. *Orient Mid-East Lines* v. *Albert E. Bowen, Inc.,* 458 F.2d 572, 574 (2 Cir. 1972); *Gardner* v. *The Calvert,* 253 F.2d 395, 398-99 (3 Cir.), *cert. denied,* 356 U.S. 960 (1958). Similarly, the claimed inconsistencies between De Salvo's notes and the telex were mere clerical errors, not evidence of lack of agreement. *Christman* v. *Maristella Compania Naviera, supra,* 349 F.Supp. at 854-57. We hold that the district court was not clearly erroneous in minimizing the weight to be given to such variations.

Interpretation of Phrase "Mobiltime sub details"

In like vein, the district court as the trier of the facts was entirely justified in its interpretation of the phrase "Mobiltime sub details" as used in De Salvo's notes to specify the basic charter party document to be used by the parties. Appellants contend on appeal, as they did below, that the phrase meant that the parties had placed a condition on the negotiations, i.e. that they had agreed on the printed Mobiltime form but that the charter party was still subject to agreement as to the details of that form. H.T. so testified.

The court rejected this interpretation and credited De Salvo's testimony to the effect that "sub details" meant placing the agreed terms of the fixture in the form and eliminating the inapplicable ones. De Salvo further tes-

tified that the phrase contemplated filling in the form with the various technical specifications of the chartered vessel. In short, according to De Salvo, "sub details" meant filling in the blanks—not reviewing the whole negotiations again.

The resolution of this conflicting testimony as to the meaning of "sub details" in the negotiations for the charter of the Oswego Reliance was the function of the district court as trier of the facts, not the function of this Court. Our role is limited to holding, as we do, that our review of the testimony satisfies us that the district court was not clearly erroneous in finding that "sub details" did not mean that a charter party had not been agreed upon.

Delivery Range and Insurance

In our opinion on the prior appeal, we directed the district court's attention to two terms of the charter party —delivery range and insurance—and suggested that it make findings as to whether there was a meeting of the minds on these terms and whether they were essential to the charter party. 462 F.2d at 677. Appellants contend that the district court was clearly erroneous in finding that there was a meeting of the minds as to both terms.

The Persian Gulf was indicated as the delivery range both in De Salvo's notes which were relayed to H.T. during the telephone negotiations on March 17 and in the fixture telex. H.T. did not object to this term at that time. It was not until he received the working copy of the charter party on March 22 that he asked De Salvo to ask Germano to modify the delivery range to include the Red Sea. This was too late. Hellenic already was bound by the agreement of March 17. We find no support for appellants' contention that there was no meeting of the minds as to delivery range. In any event, Interocean eventually agreed to H.T.'s new demand in this respect.

Appellants' contention that there was no meeting of the minds as to insurance presents a closer question. The matter of insurance was not raised in the De Salvo negotiations and was not mentioned in the telex. It first arose when the working Mobiltime form agreement was sent to H.T. Clause 23 of this form which required a Protection and Indemnity (P&I) entry was deleted because Bethlehem was a self-insurer. The district court found that, although National and Hellenic had never dealt with Interocean before, knowledge of Bethlehem's self-insurance (and hence Interocean's) could be imputed to National and Hellenic.

There was ample basis in the record to support the inference drawn by the district court in this respect. H.T. and Spears were thoroughly experienced in the field. Appellants' experts conceded Bethlehem's reputation for solvency and the fact that some large ship owners were self-insured. As the district court pointed out, moreover, if appellants had had any doubt as to the insurance to be provided by Interocean, they certainly would have raised the point immediately upon receipt of the working Mobiltime form agreement with the insurance clause deleted.

Tovalop

As to Tovalop, this issue was never raised by appellants until they attempted to subcharter the vessel. In 1971, Tovalop was still relatively new. It was not included on the Mobiltime form which was specified both in the telephone negotiations and the telex. Appellants' belated attempt to raise the Tovalop issue after March 17 did not necessarily mean that there was no agreement with respect to it, but more likely that it was outside the scope of the agreement. As the district court found:

> "It was not a condition precedent, nor even a condition subsequent, that HELLENIC be able to subcharter the OSWEGO RELIANCE. De Salvo testified, and this Court agrees, that, even if Bethlehem Steel had refused to obtain Tovalop, he considered that there was a charter on the OSWEGO RELIANCE. . . ."

In any event, Bethlehem eventually did agree to obtain Tovalop at its own expense. Indeed, it registered its entire fleet with Tovalop in order to comply.

Drydocking

In our prior opinion, we noted that Interocean had conceded that no agreement was reached on March 17 as to drydocking and suggested that the district court determine whether this was an essential term of a charter party. 462 F.2d at 676-77. On remand, the court held that the fact that the fixture telex had left the drydock clause to be worked out in the future[6] did not indicate a lack of agreement on the charter of the Oswego Reliance.

The most accurate description of the negotiations with respect to drydocking is that there was an agreement on March 17 not to agree on this term. The testimony indicated that drydocking customarily was accomplished solely at the owner's expense. The owner paid the cost of drydocking and the cost of any deviation in getting the ship to drydock, while the charterer was relieved from payment of hire during this period. Indeed, Paragraph 11 of the Mobiltime form so specified.

The district court concluded that it was to appellants' benefit and not an uncommon business practice to leave

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6 The fixture telex provided:

"SUITABLE DRYDOCK CLAUSE TO BE WORKED OUT FOR NOVEMBER DRYDOCKING ABOUT 15 DAYS WITH PROPER NOTICES."

the drydock provision open until the position of the vessel could be approximated for the period drydocking was required. The district court was not clearly erroneous in finding that lack of agreement on March 17 as to the specifications of the drydock clause was not fatal to agreement on the charter party.

We hold that the district court's findings that there was a valid charter party which contained all essential terms were not clearly erroneous and were supported by substantial evidence.

III. De Salvo's Authority

Another major question we left for the district court on remand was that of De Salvo's authority to act for National and Hellenic. We indicated, on the record before us on the prior appeal, that we had some doubt as to whether De Salvo was authorized to act for Hellenic and National or whether he acted solely for Interocean.[7] We suggested that resolution of this issue would require evidence on the relationship between the various parties as well as on the customary practice of charter brokerage. 462 F.2d at 677.

On remand, the court found that De Salvo was authorized to act on behalf of both Hellenic and National, as well as Interocean. These findings were based on the language "for your account" in the fixture telex which was sent to both National and Interocean;[8] the entire course of nego-

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7 See note 8, *infra*.

8 Our prior opinion questioned whether the statement in the fixture telex "Confirm having fixed for your account today . . . ." indicated that De Salvo was acting solely for Interocean. 462 F.2d at 677. The district court, however, found this to be one item that established his authority. This finding is not contrary to our prior opinion.

The comment in our prior opinion was based on the rather confused state of the record then before us. At that time it appeared that the fixture telex was addressed solely to Interocean. The fact is that the identical telex (except for addressees and a notation on Interocean's

tiations which took place entirely through De Salvo; his past business dealings with H.T.; H.T.'s request to "bring me a firm offer"; his statement to De Salvo to the effect that "You are confirmed"; and the custom of the trade.

The court considered precisely those factors which we indicated in our prior opinion were relevant, plus the actual events of the specific transaction in question. On the basis of H.T.'s conduct, the relationship of the parties and the custom of the industry, the court correctly drew the inference that H.T. had authorized De Salvo to act for National and Hellenic. See Restatement (Second) of Agency §§15, 26, 34 (1958). It is immaterial that De Salvo thought of himself as a "broker" and not an "agent" of Hellenic or National or Interocean, or that H.T. did not intend to make De Salvo an agent. Agency is a legal concept which depends on the manifest conduct of the parties, not on their intentions or beliefs as to what they have done. Restatement (Second) of Agency §1, comment *b* (1958).

We hold that the district court correctly analyzed the relevant factors and properly concluded that De Salvo had authority to act for Hellenic and National as well as for Interocean.[9]

IV. Scope of the District Court's Order

The district court's findings that De Salvo had authority to act for Hellenic and National meant that the signature of Poten & Partners on the fixture telex was sufficient

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copy as to commissions owed by Poten & Partners) was sent to National and Interocean. Notwithstanding our comment, therefore, the district court clearly was correct in regarding this phrase as one item supporting De Salvo's authority to act for National and Hellenic.

9 The reliance by the district court on the same factors to establish De Salvo's authority to bind both National and Hellenic was proper, since it is clear that throughout the negotiations H.T. acted in two capacities: one, as a representative of National as agent for Hellenic; the other, as a representative of National qua National.

to bind them to the contents of the telex. The court correctly pointed out that the telex served a dual function: on the one hand, it was the contract between Interocean and Hellenic; on the other, it evidenced a guarantee in writing subscribed by the agent of the party to be charged, National, and thus was enforceable under the New York statute of frauds, N.Y. General Obligations Law §5-701(2) (McKinney 1964), which we held applicable to this transaction in our prior opinion. 462 F.2d at 678.[10] See *La Mar Hosiery Mills, Inc.* v. *Credit and Commodity Corp.*, 28 Misc. 2d 764, 216 N.Y.S.2d 186 (N.Y. City Ct., 1961) (telegram held sufficient to comply with the statute of frauds). We hold that the district court's conclusion was correct in both respects.[11]

This brings us to the only part of the district court's decision with which we disagree. We believe that the court erred in failing to differentiate between the discrete roles that Hellenic and National respectively played in the negotiations. While the court properly ordered Hellenic to arbitrate since Hellenic was a party to the charter agreement,

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10 Although appellants stress the purported discrepancy between De Salvo's testimony that H.T. said a letter of guarantee *could* be given and the district court's statement that H.T. said that a letter *would* be given, we regard the difference as trivial. The intent that a letter of guarantee be given clearly is present under either version. It is that intent which governs. *Savoy Record Co.* v. *Cardinal Export Corp.*, 15 N.Y.2d 1, 4-5, 203 N.E.2d 206, 254 N.Y.S.2d 521, 524 (1964); *Salzman Sign Co.* v. *Beck*, 10 N.Y.2d 63, 66-67, 176 N.E.2d 74, 217 N.Y.S.2d 55, 57 (1961); *Mencher* v. *Weiss*, 306 N.Y. 1, 4, 114 N.E.2d 177, 179 (1953). H.T.'s subsequent statement to De Salvo that "You are confirmed" properly was construed by the district court to mean that H.T. was committing National to give the guarantee.

11 The comment in our prior opinion, 462 F.2d at 678, that National's guarantee was not in writing, like the comment referred to in note 8, *supra*, was based on the incomplete record before us at that time in which the authority of De Salvo to act for National was unclear. On remand, the district court found that authority and correctly concluded that the telex was a writing which satisfied the New York statute of frauds. N.Y. General Obligations Law §5-701(2) (McKinney 1964).

we hold that it erred in ordering National to arbitrate since National was only a guarantor and not a party to the agreement.

There can be no question that if a charter party existed (and we have held above that it did), Hellenic properly was ordered to proceed to arbitration. We do not understand appellants to claim the contrary. The telex, signed by Poten & Partners, embodied the Mobiltime agreement which contained an arbitration provision. Accordingly, there was a written arbitration clause enforceable under Section 4 of the Federal Arbitration Act by an order requiring Hellenic, a party to the agreement, to proceed to arbitration.

National, however, was not a party to the charter agreement but a mere guarantor. Whether a guarantor can be compelled to arbitrate on the basis of an arbitration clause in the main contract must be considered separately from the question of a party's obligation to arbitrate.

The only indication that the district court considered this question is its statement:

> "I . . . find that it was the understanding of the parties, through De Salvo and H.T., that NATIONAL would give the guarantee on behalf of HELLENIC and so bind itself to the charter party. . . ." (footnote omitted).

If this was meant to be a finding of fact that National had bound itself to the charter party by its acts, we find no support for it in the record. The fixture telex stated:

> "CHARTERER: HELLENIC INTERNATIONAL SHIPPING S.A. OF PANAMA SUBSIDIARY OF NATIONAL SHIPPING AND TRADING WITH APPROPRIATE LETTER OF GUARANTEE."

De Salvo's notes indicated only that Hellenic was a subsidiary of National. The Mobiltime form which National

refused to execute refers to National only as the charterer's agent. There is no evidence that National acted in any capacity except as a disclosed agent for Hellenic. As we held on the prior appeal, this is not enough to bind it to the arbitration clause in the charter agreement. 462 F.2d at 678.

If the language of the district court quoted above was meant to be a statement of law that National, by agreeing to act as a guarantor, bound itself to the arbitration clause in the main agreement, we hold it to be error. A mere guarantor of a charter party generally cannot be compelled to arbitrate on the basis of an arbitration clause in the main agreement since it is not a party to that contract. *Taiwan Navigation Co.* v. *Seven Seas Merchants Corp.*, 172 F.Supp. 721 (S.D.N.Y. 1959); see *Import Export Steel Corp.* v. *Mississippi Valley Barge Line Co.*, 351 F.2d 503, 506 (2 Cir. 1965); *Instituto Cubano De Estabilizacion Del Azucar* v. *T/V Golden West*, 246 F.2d 802 (2 Cir.), *cert. denied*, 355 U.S. 884 (1957); *Cia. Naviera Somelga, S.A.* v. *M. Golodetz & Co.*, 189 F.Supp. 90, 96 (D. Md. 1960). Although it might be said that National agreed to arbitrate since its guarantee was in the fixture telex and thus was in the same document as the main agreement, that would be a fiction since the arbitration clause is in the Mobiltime agreement, not in the fixture telex. The district court itself pointed out:

> "The guarantee was not recited in the charter-party because it was not part of it; the guarantee of performance was really a separate agreement."

True, the mere fact that a party did not sign an arbitration agreement does not mean that it cannot be held bound by it. Ordinary contract principles determine who is bound. In an appropriate situation, the corporate

veil may be pierced and a party may be held bound to arbitrate as the signatory's alter ego. *Fisser* v. *International Bank,* 282 F.2d 231, 233-34 (2 Cir. 1960). In view of the close familial relationship between Hellenic and National, this might be said to be a tempting case to hold National bound by the arbitration clause. But even if we viewed Hellenic as having no mind of its own, i.e., that it was completely dominated by H.T. and National, there is no evidence in the record before us that such control was used to perpetrate a fraud or something akin to fraud. Such a showing is a sine qua non to holding a non-signatory bound by an arbitration agreement. *Fisser* v. *International Bank, supra,* 282 F.2d at 238-40.

We modify the order of the district court by eliminating the direction that National proceed to arbitration.

As modified, the order of the district court is affirmed.